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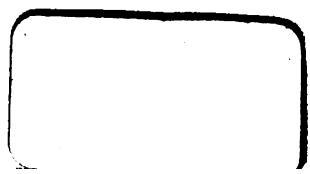
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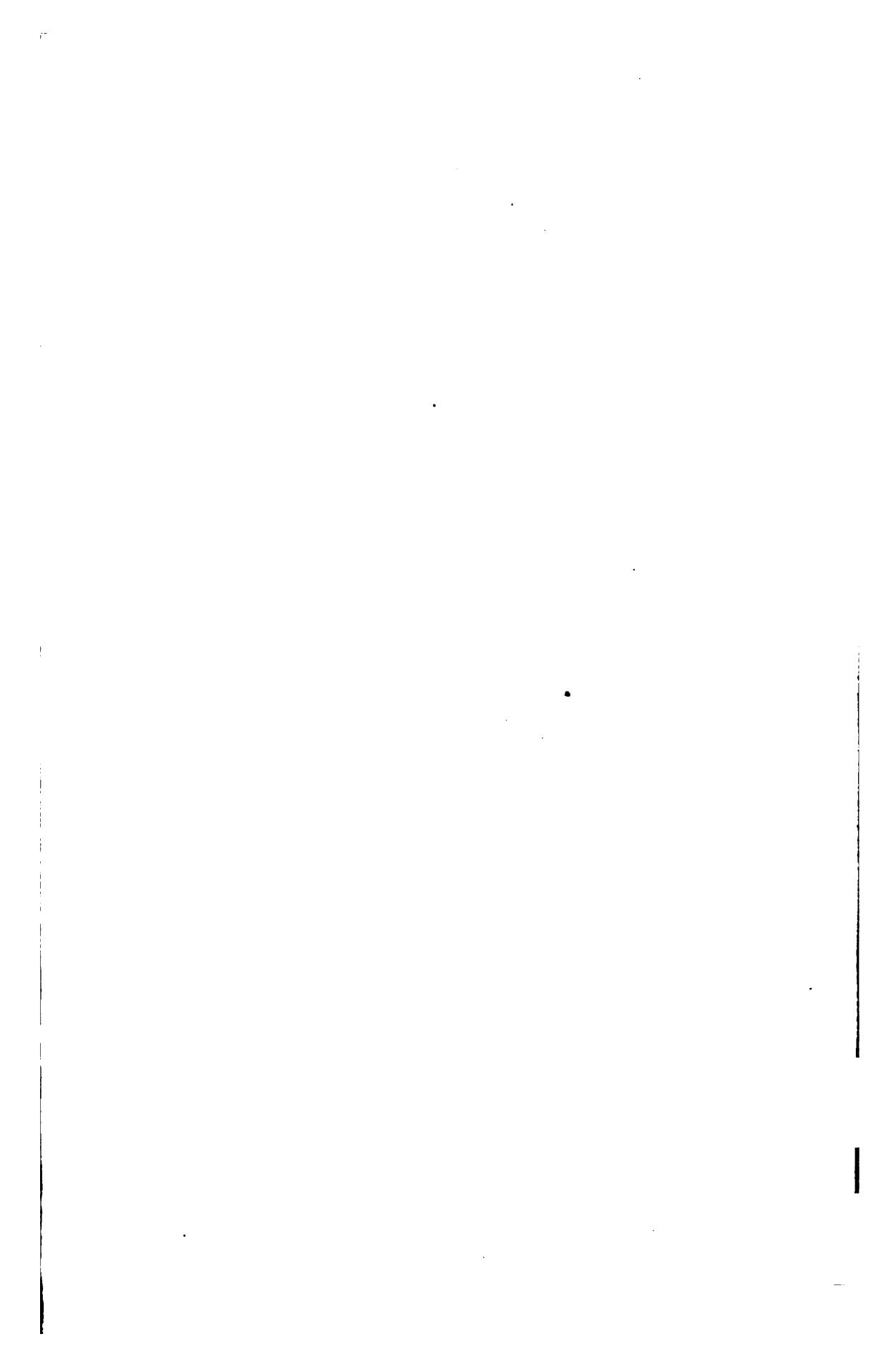
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REPORTS OF CASES

UNDER THE

BANKRUPTCY ACT, 1883,

DECIDED IN THE

High Court of Justice & The Court of Appeal.

REPORTED BY

CHARLES FRANCIS MORRELL,

Of the Middle Temple, Barrister-at-Law.

VOL. II.

COMPRISING CASES DECIDED DURING THE YEAR 1885,

TOGETHER WITH

A Complete Digest and Index.

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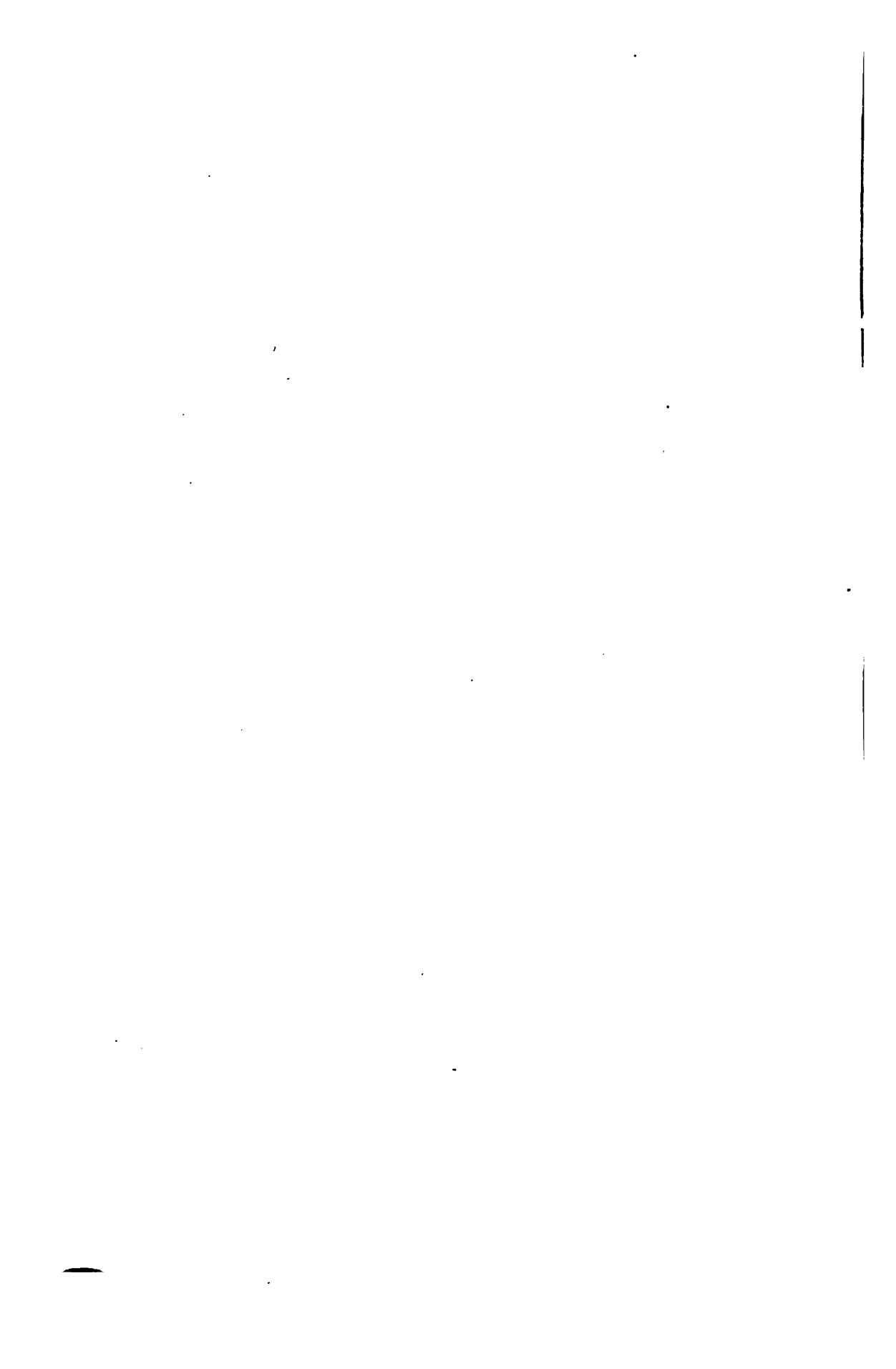
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NOTE.
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CASES OVERRULED.

- (1) The case of *In re Parker & Parker, Ex parte the Trustee*, reported at page 12, is overruled by *In re Parker & Parker, Ex parte the Board of Trade*, reported at page 158.
- (2) The decision in the case of *In re Landrock* reported in Volume I. at page 21 is overruled by *The Queen v. The Registrar of the Greenwich County Court*, reported at page 175 of this volume.



REPORTS OF CASES DECIDED UNDER THE BANKRUPTCY ACT, 1883.

PRACTICE.

IN RE ARDEN, EX PARTE ARDEN.

DIVISIONAL
COURT.
BEFORE
MATTHEW, J.
and
CAVE, J.
1884.
Dec. 4.

Bankruptcy Act, 1883, Section 142, Schedule 2, Rule 13—Bankruptcy Rules : Rule 112, 114A, 116A (April 11th, 1884).

Secured Creditor—Amendment of Proof—Second Mortgagee—Appeal—Notice of Appeal sent by Post—Time—Costs of Trustee—Rules of the Supreme Court, 1883, Order LVIII., Rule 15.

Quære.—(1) Whether, where notice of appeal is sent by post in accordance with the provisions of section 142 of the Bankruptcy Act, 1883, such notice will be in time, unless the letter is received by the respondent before the expiration of the twenty-one days during which the appeal may be brought.

Held :—(2) That, where a mortgagee who has valued his security is desirous of amending his valuation and proof under Rule 13 of Schedule 2 of the Bankruptcy Act, 1883, leave to amend may be given in a proper case, although such amendment is opposed by a subsequent mortgagee.

THIS was an appeal from an order of the learned judge of the Burslem County Court, allowing the respondent, *H. J. Deacon*, to amend the proof tendered by him to the trustee in the bankruptcy of *A. H. Arden*.

The bankrupt, *A. H. Arden*, who was a brewer, residing at Stafford, purchased in the year 1882 the brewery, stock in trade and goodwill of his business from *H. J. Deacon* for the sum of 30,000*l.*, of which amount 18,800*l.* was left on the security of a first mortgage of the property to *Deacon*.

A second mortgage for 400*l.* to Lloyd's Banking Company, and a third mortgage for 3,700*l.* to Miss *Louisa Arden*, a sister of the mortgagor, were also made upon the same property.

1884.
IN RE ARDEN,
Ex parte
ARDEN.

In the year 1884, *A. H. Arden* presented his own petition in bankruptcy, and a receiving order was made against him.

H. J. Deacon proved in the bankruptcy for the debt due to him, estimating the value of his security at 16,000*l.*; but the trustee in the bankruptcy having contracted for the sale of the brewery for something like 20,000*l.*, *Deacon* applied to the Court on August 7th, 1884, for leave to amend his proof, by increasing the value of his security to 18,800*l.*, on the ground that the first proof had been made under a *bond fide* misapprehension of the value of the property.

This application was allowed by the County Court judge, by whom the order was signed on August 27th, 1884.

In the County Court the application was opposed by the second and third mortgagees; and the third mortgagee, Miss *Louisa Arden*, now appealed from the order.

E. Cooper Willis, Q.C. (Plumptre with him), for the appellant.

Bigham, Q.C. (Boddam with him), for the respondent, *H. J. Deacon*.

Aspland for the trustee in the bankruptcy, who had been served with notice of the appeal.

Bigham, Q.C.:

I have a preliminary objection. The notice of appeal was served too late. The order was signed by the learned County Court judge on August 27th, 1884. The appeal was entered with the registrar on September 17th. On the same day notice of the appeal was sent to the solicitors of *Mr. Deacon* by post. It was not received by them, however, until September 18th. That was after the expiration of twenty-one days from August 27th.—(See *Rules of the Supreme Court, Order LVIII., Section 15.*)

E. Cooper Willis, Q.C.:

Section 142 of the Bankruptcy Act, 1883, provides that "All notices and other documents for the service of which no special mode is directed may be sent by prepaid post letter to the last known address of the person to be served therewith." If the letter is posted within the twenty-one days it is quite sufficient.

HIGH COURT OF JUSTICE.

3

Bigham, Q.C.:

The practice was fully established in the case of *Ex parte Viney*,
In re Gilbert (L. R., 4 Ch. Div. 794; 46 L. J., Bank. 80; 36 L. T. 43), where it was held, that "in estimating the twenty-one days allowed for appealing, Sundays are not to be excluded, and the material date is, not that of entering the appeal with the registrar, but that of service of the notice of appeal on the respondent." And in *Ex parte Saffery*, *In re Lambert* (L. R., 5 Ch. Div. 365; 46 L. J., Bank. 89; 36 L. T. 532), an order, which was a refusal of an application, was made by the London Bankruptcy Court on March 10th. An appeal was entered with the Registrar of Appeals on April 4th, and on the same day notice was served on the respondent. The registrar's office had been entirely closed for the Easter vacation from March 30th to April 3rd, both inclusive. Nevertheless, it was held "that notwithstanding the closing of the office, the notice of appeal might have been served on the respondent, and that, as it had not been served within twenty-one days, the appeal was too late." In effect, an appeal is brought when notice is served.

1884.

IN RE ARDEN,
EX PARTE
ARDEN.

E. Cooper Willis, Q.C.:

Even if that contention is right the Court has full power to extend the time, and it will do so in the case of a mere technical objection of this kind.

MATHEW, J.:

There may be some doubt whether the service of the notice of appeal was in time. Under the circumstances, therefore, we will exercise our power of extending the time if it be necessary.

CAVE, J., concurred.

E. Cooper Willis, Q.C.:

The case is one of mistake in valuing a security, and my client has been injured by the allowance of the amendment. My client is the third mortgagee, and the order injures her because the trustee will have to pay more to redeem the first mortgage, and the assets available for the other creditors will be diminished. The rules relating to the amendment of proof by secured creditors are contained in Schedule 2 of the Bankruptcy Act, 1883, Rules

1884. 9 to 17. I refer particularly to Rule 13, which provides that
 IN RE ARDEN,
 EX PARTE
 ARDEN.
 “where a creditor has so valued his security he may at any time amend the valuation and proof on showing to the satisfaction of the trustee or the Court, that the valuation and proof were made *bond fide* on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation: but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the trustee shall allow the amendment without application to the Court.” The new Act doubtless gives great powers of amendment to secured creditors, but I submit that the rule does not apply in any case where, besides the trustee and the creditor who has made the valuation, a third party is interested in the property. It was never intended to apply these rules in cases when there were third parties interested.

Bigham, Q.C. (Boddam with him), were not called on.

MATHEW, J.:

Judgment. I am of opinion that the rule applies. Mr. *Willis's* contention amounts to this, that the rules do not apply where there are other mortgagees besides the secured creditor. I am satisfied that that contention cannot be allowed to prevail, and that the third mortgagee has no such right as has been claimed. The first mortgagee cannot be deprived of the right which is given to him by the rules, because there happens to be a subsequent mortgagee.

CAVE, J.:

I am entirely of the same opinion.

Appeal dismissed, with costs.

Aspland for the trustee.

I appear for the trustee in the bankruptcy, and I ask your Lordships for costs.

CAVE, J.:

You will not get them. A trustee must not come here when his presence is not necessary as a merely ornamental respondent.

Solicitors : *Jennings, Son & Burton* for the appellant.

Ashurst, Morris, Crispe & Co. for the respondent.

Duffield & Bruty for the trustee.

COURT OF APPEAL.

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CASES relied upon or referred to :—

1884.

Ex parte Viney, In re Gilbert, L. R., 4 Ch. Div. 794; 46 L. J., IN RE ARDEN,
Bank. 80; 36 L. T. 43. EX PARTE
ARDEN.

Ex parte Saffery, In re Lambert, L. R., 5 Ch. Div. 365; 46
L. J., Bank. 89; 36 L. T. 532.



PRACTICE.

IN RE ANGELL, EX PARTE SHOOLBRED.

COURT OF
APPEAL.

BEFORE THE
MASTER OF
THE ROLLS,
COTTON, L.J.,
LINDLEY, L.J.
1884.

Dec. 12.

Bankruptcy Rules, 1883, Rule 98.

Costs : "As between solicitor and client"—Time of Application.

The Court by three orders gave costs "as between party and party." Subsequently an application was made that such costs might be "as between solicitor and client;" which application was refused.

Held (on appeal) :—That the application ought to have been made to the Court at the time when the costs were awarded; and that the words of Rule 98 of the Bankruptcy Rules, 1883—"the Court in awarding costs"—mean at the time when the Court makes the order.

THIS was an appeal by leave from a decision of the registrar refusing to the appellant *Shoolbred* costs "as between solicitor and client," in connection with certain proceedings arising out of the bankruptcy of the debtor *Angell*.

The appeal was brought under Rule 98 of the Bankruptcy Rules, 1883, which provides that "(1) The Court, in awarding costs, may direct that the costs of any matter or application shall be taxed and paid as between party and party, or as between solicitor and client, or that full costs, charges, and expenses shall be allowed, or the Court may fix a sum to be paid in lieu of taxed costs."

Herbert Reed for the appellant.

The learned registrar said that there was no precedent for such an application. There was nothing analogous in the Rules of 1870. The facts of the case are these :—On December 13th, 1883, the debtor, *Angell*, presented a petition for liquidation, and on December 17th he obtained the appointment of his own book-keeper as receiver of his property. At the first meeting a composition of 5s. in the pound was offered, which all the creditors were

1884. willing to accept, except *Shoobred*. Mr. *Shoobred* opposed the registration, and in consequence of his opposition the registrar declined to register the resolutions. Proceedings in bankruptcy were then taken by *Shoobred* against *Angell*; the book-keeper was removed, and a receiving order made. On this the debtor offered a composition of 7s. in the pound—2s. more than his original offer—which some creditors were willing to accept, but Mr. *Shoobred* again opposed. Adjudication followed, and a trustee was appointed. As a result, 16s. in the pound has been paid to everybody, and it is anticipated that 20s. in the pound will be realized. All this has been brought about by the individual exertions of Mr. *Shoobred*. In the course of these proceedings three orders were made in favour of Mr. *Shoobred* on January 29th; on May 6th; and on June 19th. The Court made the orders for costs "as between party and party," but it was felt that, under the circumstances, this was not sufficiently favourable, and on application being subsequently made that the costs might be "as between solicitor and client," the Court refused to accede to it.

[COTTON, L. J.: Your time for applying for this was when the Court awarded the costs. The rule says "the Court in awarding costs," otherwise we have to go into all the circumstances of the case.]

I submit that it may be by subsequent application.

[LINDLEY, L. J.: See what that involves. We have to go through the mass of proceedings in order to see if the case is meritorious. Must not the application be made to the Court at the time when it is awarding the costs?]

At that time it was not certain that 20s. in the pound would be paid. Now we say that by our individual exertions that will be done. Also I applied for other costs besides those mentioned in the three orders, so Rule 98 would not quite cover my application.

[The MASTER OF THE ROLLS: Then you say that the orders of the registrar were right when they were made, and now you want us to make a new substantive order, since the aspect of affairs is changed. I do not say what would be right, but, Is there any power for us to do it?]

McDonnell for the trustee was not called on.

The MASTER OF THE ROLLS (BRETT) :

1884.

It seems to me that when the Court makes an order as to costs, the Court has the power of declaring whether those costs shall be "as between solicitor and client," or whether they shall be "as between party and party." In this case three orders were made, and the Court gave costs "as between party and party." If there was any objection to this when each order was made, the appeal ought to have been at once. I may say incidentally that an appeal against such an order will be as difficult an appeal as can be, if it is ever brought forward, but I do not say that it cannot be brought. The question of costs is a matter of discretion for the Court which awards them. Now it is admitted that when the orders in this case were made they were right, and we are, in fact, now asked to make a new substantive order. I am of opinion that, without considering whether the orders were right or not, we have no jurisdiction to do so.

IN RE ANGELL,
EX PARTE
SCHOOLBRED.
Judgment.

COTTON, L. J. :

I am of opinion that the registrar was right in refusing to make the order appealed from. Rule 98 says, "the Court in awarding costs may direct, &c.," and that must mean when it makes an order. The reason is obvious. If it is not done then when the circumstances are before the Court, to do it afterwards the Court would have to unrip the whole matter. Solicitor and client's costs are an exceptional thing, and are only given to favoured persons, and I see no reason why they should be given unless in exceptional cases.

LINDLEY, L. J. :

I am of the same opinion. If this application was acceded to, it would open a door to applications which would give rise to inconveniences of all kinds. At the close of a bankruptcy it would be asked to open up the whole proceedings to see how the costs ought to have been taxed.

Appeal dismissed, with costs.

Solicitors : *Miller & Vernon* for the appellant.

The Official Solicitor for the trustee.

BEFORE
MR. JUSTICE
CAVE.
1884.
Dec. 15.

IN RE CHUDLEY, EX PARTE THE BOARD OF TRADE.

Bankruptcy Act, 1883, Section 102, Sub-section (5), and Section 162, Sub-section 2 (b).

Application on behalf of the Board of Trade for an order requiring a trustee under a liquidation to submit an account verified by affidavit of the sums received by him. Previous release and discharge of such trustee. Right of the Board of Trade to demand an account.

THIS was an application on behalf of the Board of Trade for an order under section 102, sub-section (5) of the Bankruptcy Act, 1883, requiring one, *W. Cooper*, to submit an account, verified by affidavit, of the sums received by him as trustee in the liquidation of the debtor, *S. Chudley*, in accordance with a request previously made to him by the Board of Trade under section 162, sub-section 2 (b) of the above-named Act, relating to unclaimed and undistributed funds and dividends.

In the year 1874, a petition for liquidation was filed by *Chudley*, under which resolutions for liquidation by arrangement were duly passed, and *W. Cooper* was appointed trustee. A dividend was subsequently paid to the creditors.

On October 3rd, 1883, a meeting of creditors was held, at which the accounts of the trustee were duly audited, and a resolution was passed by which the liquidation was closed, and a sum of 75*l.* 17*s.* 8*d.* remaining in the hands of the trustee voted to him for remuneration, and his discharge granted as from October 31st.

On July 15th, 1884, however, an order was made by the Board of Trade, under section 162, sub-section (2) of the Bankruptcy Act, 1883, requiring *W. Cooper* to submit to them an account, verified by affidavit, of his receipts and payments as trustee.

This order not having been complied with, the Board of Trade now applied to the Court to enforce it.

Bonsey for the Board of Trade, stated the facts as above, and read an affidavit of the Inspector-General in Bankruptcy in support.

Yate Lee for Mr. Chudley :

I say at once that if Mr. Chudley were able to furnish these accounts, he would be perfectly willing to do so. He has nothing to conceal ; but the liquidation is ten years old, and he cannot do so. There arises the important question, however, whether he can be compelled. I submit not, and I purpose to show that section 162 does not apply in a case like the present, and that your Lordship has no jurisdiction to make the order asked for. On October 3rd there was a statutory audit of the accounts of the trustee ; he was released as from October 31st, and the liquidation was closed. Those circumstances put an end to the right of the Board of Trade to require an account. By section 125, sub-section (9) of the Bankruptcy Act, 1869, it was provided that "the provisions of this Act with respect to the close of the bankruptcy, discharge of a bankrupt, to the release of the trustee, and to the audit of accounts by the comptroller, shall not apply in the case of a debtor whose affairs are under liquidation by arrangement ; but the close of the liquidation may be fixed, and the discharge of the debtor and the release of the trustee may be granted by a special resolution of the creditors in general meeting, and the accounts may be audited in pursuance of such resolution, at such time and in such manner, and upon such terms and conditions as the creditors think fit." The effect of a release so granted is the same as that of the release of a trustee in a bankruptcy under that Act, which, by section 53, "shall discharge him from all liability in respect of any act done, or default made, by him in the administration of the affairs . . . or otherwise in relation to his conduct as trustee." In this case a special resolution was duly passed, granting the release, auditing the accounts, and closing the liquidation. As from the date of that special resolution the trustee was free.

[CAVE, J.: Under the old Act !]

There must be found words in the new Act of 1883 strong enough to take away that absolute freedom before the order asked for can be made. In cases where a trustee was responsible to the creditors for his stewardship, it is intelligible that the Board

1884.
IN RE
CHUDLEY,
EX PARTE
THE BOARD
OF TRADE.

1884.
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 CHUDLEY,
 EX PARTE
 THE BOARD
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of Trade might be placed in the position of the creditors, and could come forward and claim an account. But it is monstrous to suppose that where a release of this kind is given, the Board has power to come forward and order the whole matter to be overhauled. Section 162, sub-section (2), provides (a) "Where, after the passing of this Act, any unclaimed or undistributed funds or dividends in the hands, or under the control of any trustee, or other person empowered to collect, receive, or distribute any funds or dividends under any Act of Parliament mentioned in the Fourth Schedule, or any petition, resolution, deed, or other proceeding under or in pursuance of any such Act, have remained, or remain, unclaimed or undistributed for six months after the same became claimable or distributable, or in any other case for two years after the receipt thereof by such trustee or other person, it shall be the duty of such trustee or other person forthwith to pay the same to the Bankruptcy Estates Account at the Bank of England. The Board of Trade shall furnish such trustee or other person with a certificate of receipt of the money so paid, which shall be an effectual discharge to him in respect thereof." And (b) "the Board of Trade may at any time order any such trustee or other person to submit to them an account, verified by affidavit, of the sums received and paid by him under or in pursuance of any such petition, resolution, deed, or other proceeding as aforesaid, and may direct and enforce an audit of the account." It is clear that this cannot refer to a trustee who has an absolute discharge: the persons referred to are persons who have power "to collect, receive, or distribute:" as from October 3rd Mr. Cooper had no power to do this.

[CAVE, J.: He was not discharged at the passing of the Act.]

At the present time he is not a person empowered "to collect, receive, or distribute."

[CAVE, J.: At the passing of the Act he was.]

Section 162, sub-section 2 (b), ought to be read "the Board of Trade may at any time order any such trustee or other person (*empowered to collect, receive, or distribute, &c.*) to submit to them an

account. There is nothing in the sub-section restricting the right of persons who have got a statutory discharge. At the time when the Board of Trade made their application Mr. *Cooper* was not a trustee empowered to collect, receive, or distribute; and I contend that, looking at the resolutions of October 3rd, there were no unclaimed or undistributed assets, and the Board of Trade had no power to require an account.

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 CHUDLEY,
 EX PARTE
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 OF TRADE.

CAVE, J.:

I am of opinion that this case is extremely clear. Section 162, Judgment. sub-section 2 (a) of the Bankruptcy Act, 1883, provides (*his Lordship read the sub-section. Compare ante, p. 10*). This gentleman, Mr. *Cooper*, was a trustee empowered to collect, receive, and distribute, under a liquidation petition; and on August 25th, 1883, the date of the passing of the Bankruptcy Act, he had 75*l.* in his hands undistributed. That sum he was bound to pay in to the Bankruptcy Estates Account at the Bank of England. He did not do so. He did call a meeting of the creditors, at which resolutions were passed granting the whole 75*l.* to him. But these resolutions did not release him from his previous liability. It has been argued that the words in sub-section 2 (b) must be taken to be "such trustee or other person" empowered to collect, receive, or distribute. That is the position in which Mr. *Cooper* found himself, and, in my opinion, he falls decidedly within the words and intention of the Act. There will be an order that the trustee shall within three weeks submit an account verified by affidavit, and he must pay the costs.

Order accordingly.

Solicitors: *Munton* for the Board of Trade.

Hindson, Miller & Vernon for the trustee.



BEFORE
MR. JUSTICE
CAVE.
1884.
Dec. 16.

IN RE PARKER AND PARKER, EX PARTE THE TRUSTEE.

*Bankruptcy Act, 1883, Sections 9, 10, 12, 21, 54, 68, 69, and Section 70.
Powers and Duties of the Official Receiver—Sale by him of Bankrupt's Property after Adjudication and before the Appointment of a Trustee.*

Held :—That where, before the appointment of a trustee by the creditors, the official receiver is acting as trustee in a bankruptcy for the purposes of the Act, his powers and duties are limited to those of a receiver and manager appointed by the High Court, in accordance with the provisions of section 70 of the Bankruptcy Act, 1883.

Such official receiver when so acting, therefore, may not sell any part of the property of the bankrupt.

Quare.—Whether the Board of Trade can, in such a case, legally authorize the official receiver to sell any part of the bankrupt's property.

THIS was an application on behalf of the trustees of the estate of the bankrupts for an order declaring that the sale of the furniture and other effects of the bankrupts by the chief official receiver was *ultra vires*, and unauthorized by the provisions of the Bankruptcy Act, 1883: and further, that the percentage retained in respect of the amounts received by the chief official receiver in reference to such sale, together with the charges of the auctioneer for conducting the sale, should be refunded to the trustees.

The bankrupts were Messrs. F. S. and W. S. Parker, the well-known solicitors in Bedford Row, against whom a bankruptcy petition was filed on March 6th last.

On March 13th, 1884, a receiving order was made; and on March 20th Messrs. Parker and Parker were adjudicated bankrupts.

On April 18th, 1884, the first meeting of creditors was held, at which Messrs. Turquand and Whinney were appointed trustees of the estate; and on April 21st the certificate of the Board of Trade was granted, by which the appointment of the trustees was confirmed.

Immediately after the adjudication, however, and before the appointment of the trustees, the official receiver directed a sale by auction of the furniture and effects of the bankrupts at Courtfield Gardens and Dane End. This sale took place on March 31st,

April 1st, and April 2nd, and the proceeds of it amounted to £5,583*l.* From this sum the official receiver had deducted more than £330*l.* as his percentage under Table D of the Act, and the charges of the auctioneer, amounting to £06*l.*

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Motion was now made to the Court, on the ground that the conduct of the official receiver in the matter was irregular and unauthorized.

Arthur Charles, Q.C. (J. Linklater with him), for the trustees :

The official receiver has no such power as he has presumed to exercise in this case. He did not consult or obtain any authority from the Board of Trade. Even if he had obtained authority from the Board of Trade, it seems to me very doubtful whether he would be entitled to have a sale without consulting the wishes of the creditors. In order to support the assertion I have made, it is necessary to ascertain the exact position and powers of the official receiver as defined in the new Act. To do that, each section in which the official receiver is mentioned must be consulted. We begin with section 9, which provides that "on the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, &c.," and section 10, where it is provided that "the Court may, if it is shown to be necessary for the protection of the estate, at any time after the presentation of a bankruptcy petition, and before a receiving order is made, appoint the official receiver to be interim receiver of the property of the debtor or of any part thereof, and direct him to take immediate possession thereof or of any part thereof." Section 12 gives to the official receiver the power to appoint a special manager of the debtor's estate or business in cases where it is necessary; and section 17 deals with the public examination of the debtor, and the duties of the official receiver in connection therewith. Turning now to section 21, we find the course laid down by the Act for the appointment of a trustee, and by sub-section (5) of that section, "the official receiver shall not, save as by this Act provided, be the trustee of the bankrupt's property," while by sub-section (6) "if a trustee is not appointed by the creditors within four weeks from the date of the adjudication * * * the official receiver shall report the matter to the Board of Trade," who shall thereupon make the appointment. Passing

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over section 28, which merely states that on the application of a bankrupt for his discharge, the Court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs, we come to section 54, which provides that (1) "until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee," but (2), "on the appointment of a trustee, the property shall forthwith pass to and vest in the trustee appointed." Sections 68 and 69 deal merely with the status of the official receiver and his duties as regards the debtor's conduct; but the really important section with regard to this case is section 70. That section deals with the duties of the official receiver as to the debtor's estate, and is as follows:—

"(1) As regards the estate of a debtor it shall be the duty of the official receiver—

- (a) Pending the appointment of a trustee, to act as interim receiver of the debtor's estate, and, where a special manager is not appointed, as manager thereof;
- (b) To authorize the special manager to raise money or make advances for the purposes of the estate in any case where, in the interests of the creditors, it appears necessary so to do;
- (c) To summon and preside at the first meeting of creditors;
- (d) To issue forms of proxy for use at the meetings of creditors;
- (e) To report to the creditors as to any proposal which the debtor may have made with respect to the mode of liquidating his affairs;
- (f) To advertise the receiving order, the date of the creditors' first meeting and of the debtor's public examination, and such other matters as it may be necessary to advertise;
- (g) To act as trustee during any vacancy in the office of trustee.

"(2) For the purpose of his duties as interim receiver or manager the official receiver shall have the same powers as if he were a receiver and manager appointed by the High Court, but shall, as far as practicable, consult the wishes of the creditors with respect to the management of the debtor's property, and may for that purpose, if he thinks it advisable, summon meetings of the persons claiming to be creditors, and shall not, unless the Board of Trade otherwise order, incur any expense beyond such as is requisite for

the protection of the debtor's property or the disposing of perishable goods.

"Provided that when the debtor cannot himself prepare a proper statement of affairs, the official receiver may, subject to any prescribed conditions, and at the expense of the estate, employ some person or persons to assist in the preparation of the statement of affairs.

"(3) Every official receiver shall account to the Board of Trade and pay over all moneys and deal with all securities in such manner as the Board from time to time direct."

There is nothing in this section 70 which empowers the official receiver to sell the property of the debtor, and I submit there is nothing in any other part of the Act which authorizes him to do more than he is authorized to do by section 70. The official receiver is to have "the same powers as if he were a receiver and manager appointed by the High Court, but shall, as far as practicable, consult the wishes of the creditors with respect to the management of the debtor's property." A receiver and manager can never exercise such powers as have been exercised in this case. (*Counsel also referred to the Bankruptcy Rules, 1883, Rules 2, 172, 207, 208, 209, and 247.*) The last rule I have read (Rule 247) is important, for it provides that "where a debtor is adjudged bankrupt, and a trustee is appointed, the official receiver shall forthwith put the trustee into possession of all the property of the bankrupt which the official receiver may be possessed of; and it shall be the duty of the official receiver to communicate to the trustee all such information respecting the bankrupt and his estate and affairs as may be necessary or conducive to the due discharge of the duties of the trustee." Also by Rule 249 (2), "Where a debtor is adjudged bankrupt, and a trustee is appointed, the official receiver shall account to the trustee in the bankruptcy." In Table D the fees and percentages of the official receiver are set out. With regard to the sale of perishable property, the official receiver has much the same power as an official assignee under the Bankruptcy Act, 1849. This idea of a receiver absolutely negatives the idea of a sale. The official receiver certainly has not, without the authority of the Board of Trade—and I submit that he has not even with such authority—any such power as has been exercised in the present case.

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Sir Farrer Herschell, Solicitor-General (Muir Mackenzie with him) for the official receiver.

The intention of the Act is to give to the official receiver the power of sale. But I admit that unless the interests of the creditors demand prompt action, the official receiver ought not to exercise such power without first consulting them. In the present case the official receiver acted in the interest of the creditors. I only contend for the right of sale after adjudication, when the official receiver becomes, not only receiver, but also trustee. No sale took place until after the adjudication. Section 54, sub-section (1) provides that "until a trustee is appointed, the official receiver shall be the trustee for the purposes of this Act; and immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee." In effect, the section provides that the official receiver becomes trustee the moment an adjudication takes place. Now, by section 56, "Subject to the provisions of this Act, the trustee may do all or any of the following things:—(1) Sell all or any part of the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt) by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels." And by section 68, sub-section (3), "All expressions referring to the trustee under a bankruptcy shall, unless the context otherwise requires, or the Act otherwise provides, include the official receiver when acting as trustee." The official receiver, in fact, when acting as trustee, is endowed with all the powers of a trustee under a bankruptcy, and his powers cannot be less when he actually is trustee than when he is only acting as trustee. It is true that section 70, which has been so much relied upon, does deal with the duties of the official receiver as to the debtor's estate; but it does not in any way apply to his powers as trustee, nor does it in the slightest degree narrow them down. It is, of course, fully understood in this case that the official receiver had no personal interest in the matter. He is an officer of the Board of Trade, and is paid by salary.

Arthur Charles, Q.C. in reply.

CAVE, J.:

Judgment.

The present case is one of great importance, and I should, in

all probability, under ordinary circumstances, have reserved my judgment. But I have come to a perfectly clear conclusion, and there can be no advantage obtained from delay. I will, therefore, deliver judgment at once. The allegation in the present case is this:—That the official receiver exceeded the powers given to him by law, by ordering a sale of certain property of the bankrupts immediately upon their adjudication, and before the appointment of any trustee. It is alleged (1) that the official receiver has not this power at all under any circumstances without the consent of the Board of Trade: and (2) even if the Board of Trade gave its consent, the official receiver would have no such authority. With regard to the second of these contentions it is not necessary for me now to express an opinion. It is clear, in the present case, that the consent of the Board of Trade was not obtained. What I have to decide, therefore, in this case is, whether the official receiver has, by virtue of his office alone, the power of ordering a sale of a debtor's effects as soon as that debtor has been adjudicated a bankrupt. To answer that question it is necessary to examine the material sections of the Act. The first section of importance is section 54. It provides “(1) Until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee. (2) On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed.” Now, if this section stood alone, I should be bound to read the words as meaning for all the purposes of the Act, and, by section 56, I find that “subject to the provisions of this Act, the trustee may do all or any of the following things,” and in the list which follows the first thing which may be done is, “(1) Sell all or any part of the property of the bankrupt,” &c. Taking section 54 and section 56 together, therefore, it would seem that, subject to the provisions of the Act, the official receiver is entitled to sell the property of the bankrupt. But it is necessary further to consider the provisions of the Act as to whether any of them cut down this power. It is necessary, I say, to go further, and the next important section we come to is section 68. There it is provided that “all expressions referring to a trustee shall, unless the context otherwise requires, or the Act

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1884. otherwise provides, include the official receiver when acting as trustee," and it seems to put the matter even more clearly than the two sections which I have before read. Taking all these section together, what it comes to is this, that "subject to the provisions of this Act, the trustee or the official receiver, when acting as trustee, may sell, &c." If the matter rested there; if these sections contained all that was said in defining the powers of the official receiver, there seems little doubt but that the official receiver, when acting as trustee, would have the same powers as a trustee, one of which powers is "to sell." But there is the important section 70 yet to be considered. That section deals with, clearly and definitely, the duties of the official receiver as to the debtor's estate. Sub-section (2) provides that "For the purpose of his duties as interim receiver or manager, the official receiver shall have the same powers as if he were a receiver and manager appointed by the High Court, but shall, as far as practicable, consult the wishes of the creditors with respect to the management of the debtor's property, and may for that purpose, if he thinks it advisable, summon meetings of the persons claiming to be creditors; and shall not, unless the Board of Trade otherwise order, incur any expense beyond such as is requisite for the protection of the debtor's property or the disposing of perishable goods." And in sub-section 1 (a) it shall be the duty of the official receiver, "pending the appointment of a trustee, to act as interim receiver of the debtor's estate, and where a special manager is not appointed as manager thereof." The trustee there mentioned is undoubtedly the trustee appointed by the creditors, and, in my opinion, the section deals with the powers and duties of the official receiver, both up to and after adjudication. The section says he is to act as receiver and manager, and those terms being somewhat vague, there are added the explanatory words in the sub-section I have read. The qualification in the former sections, "subject to the provisions of this Act," and "unless the Act otherwise provides," become thus intelligible. The Act provides that the official receiver shall consult the wishes of the creditors with respect to the management of the debtor's property: and, further, that he shall not, unless the Board of Trade otherwise order, incur any expense beyond such as is requisite for the protection of the

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debtor's property. I feel bound to look upon these expressions as precise and definite limitations of those powers which the official receiver undoubtedly would have had if the preceding sections of the Act had not been qualified. In the face of those expressions, I feel that I cannot, without doing violence to the language of the Act, say that the official receiver had, by virtue of his office, and without the sanction of the Board of Trade, the power of sale which he exercised in the present case. As to whether the Board of Trade itself has any authority to sanction a sale by the official receiver, I will offer no opinion. The question is not before me now, and it is not necessary for me to give any judgment. I will say this much, however, and I say it notwithstanding that there cannot be the slightest doubt that the percentage thus obtained is honestly applied to the payment of expenses. If the question ever does arise, the fact that the percentage goes to the Board of Trade, and that the body which orders the sale also receives the percentage, cannot be without weight. So far as the present case is concerned, I am clearly of opinion that the sale was illegal for the reasons I have stated, and the only question which now remains is what course I ought to take under the circumstances. There is no charge against the *bona fides* of the official receiver, and it is not suggested that the trustee, if the opportunity had been left to him of selling this property, could have sold it to better advantage or dealt with it in a better manner. For this reason I am of opinion that the expenses of the auctioneer ought to be allowed. The percentage upon the sale, deducted by the official receiver, however, must be refunded to the trustee, because the sale was illegal and the taking of the percentage was in consequence equally illegal.

Judgment accordingly.

Solicitors: *Linklater & Son* for the trustee.

The Solicitor to the Board of Trade for the official receiver.

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DIVISIONAL
COURT.
BEFORE
CAVE, J., AND
WILLS, J.
1885.
Jan. 10.

IN RE STEPHENS, EX PARTE THE TRUSTEE.

Bankruptcy Act, 1883, Section 163—Bankruptcy Rules, 1883, Rule 111 (3).

Appeal from refusal to order prosecution of a bankrupt. Fraudulent removal of furniture. The Debtors Act 1869 (32 & 33 Vict. c. 62), Sections 11, 12 and 16.

THIS was an appeal from a decision of the learned Judge of the Birkenhead County Court, by which he refused to order the prosecution of the bankrupt *Stephens*, on the charge of having within four months before the presentation of a bankruptcy petition against him, fraudulently removed certain articles of furniture above the value of 10*l.*; or to order the trustee in the said bankruptcy to prosecute the bankrupt and one *J. Coffey* for conspiring to remove the said furniture.

The debtor, *Stephens*, formerly carried on business in Oxten Road, Birkenhead, as a baker and general confectioner, and after being for some time in difficulties, on August 14th, 1884, he called a private meeting of his creditors. At this meeting a statement of affairs was put forward in which the furniture at his place of business was valued at 30*l.*, and an offer of 5*s.* in the pound was made. This offer, however, was refused by the creditors.

On the next day, August 15th, *J. Coffey*, the brother-in-law of the debtor called on one *J. Jones*, a furniture remover, residing in Birkenhead, and inquired the charge for removing certain furniture from the debtor's residence in Oxten Road to Hartnup Street, Liverpool, and, after inspection, *J. Jones* agreed to remove it for 3*l.* The furniture was thereupon immediately removed, the debtor assisting in the removal, and subsequently meeting *Coffey* in Hartnup Street, who helped him to unload it into the house.

On August 21st a bankruptcy petition was presented against *Stephens*; a receiving order was made, and one *R. Jones* was appointed trustee.

The public examination of the debtor was held at the Birkenhead County Court on September 17th, and adjourned to October 29th, and November 12th respectively.

At the examination on September 17th, the debtor admitted that a private meeting of the creditors had been called, and that 5s. in the pound had been offered and refused. The debtor was also examined on his statement of affairs in the bankruptcy, in which no mention was made of the furniture formerly valued at 30*l.*, and he said that he knew nothing of its removal, and that such furniture belonged to his wife.

At the examination on October 29th, further inquiries were made with regard to the furniture, when the debtor again asserted that he did not know where it was, and further that he was at enmity with his brother-in-law, *J. Coffey*, and had not seen him for seven years.

At the examination on November 12th, however, the trustee at length discovered that the furniture in question was at Ulleswater Street, Liverpool, where it had been removed from Hartnup Street; and the trustee thereupon took possession of it.

In consequence of the conduct of the debtor application was made to the County Court to order his prosecution, which application was refused. From this refusal the trustee now appealed.

F. C. Willis, for the trustee, after stating the facts as above, and reading the affidavits of *J. Jones* and *R. Jones*, and the short-hand writer's notes of the public examination of the debtor, in support, said :

Section 163 of the Bankruptcy Act, 1883, provides "(1) Sections 11 and 12 of the Debtors Act, 1869, relating to the punishment of fraudulent debtors, and imposing a penalty for absconding with property, shall have effect as if there were substituted therein for the words, 'if after the presentation of a bankruptcy petition against him,' the words, 'if after the presentation of a bankruptcy petition by or against him'; (2) The provisions of the Debtors Act, 1869, as to offences by bankrupts shall apply to any person whether a trader or not in respect of whose estate a receiving order has been made, as if the term 'bankruptcy' in that Act included a person in respect of whose estate a receiving order has been made." (*Counsel then read sections 11 and 12 of the Debtors Act, 1869, 32 & 33 Vict. c. 62.*) The charges I make are under sub-sects. (1), (2), (4), (5) and (6) of section 11 of the Debtors Act, 1869. I

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submit that, having regard to the evidence which has been given in the affidavits, it is clear that the debtor was present when the furniture was removed, and had full cognizance of its removal. In the face of the shifty answers given by the debtor in his examinations, it is monstrous to suppose otherwise. Section 16 of the Debtors Act provides that "where a trustee in any bankruptcy reports to any Court exercising jurisdiction in bankruptcy, that in his opinion a bankrupt has been guilty of any offence under this Act, or where the Court is satisfied upon the representation of any creditor or member of the committee of inspection that there is ground to believe that the bankrupt has been guilty of any offence under this Act, the Court shall, if it appears to the Court that there is a reasonable probability that the bankrupt may be convicted, order the trustee to prosecute the bankrupt for such offence." All that is necessary is that the Court must be satisfied "that there is ground to believe that the bankrupt has been guilty of any offence," and that "there is a reasonable probability that the bankrupt may be convicted." All that the Court has to do is to be satisfied that there is a *prima facie* case, it will be for a jury to say whether the charge can be substantiated. I may say that I mentioned this case in the Divisional Court on the Friday before Christmas, and the Lord Chief Justice who was then a member of the Court considered that the Solicitor for the Treasury should have notice. Notice has now been given to the Treasury, and counsel is present on their behalf.

R. S. Wright, for the Solicitor for the Treasury :

I say at once that I do not think I have any *locus standi* to address the Court. I am only here in obedience to the suggestion of the Lord Chief Justice.

[CAVE, J.: You have had notice, and have seen all the papers in the case, I suppose.]

Yes. I may say, however, that I am in doubt whether there would have been any jurisdiction at all for this Court to interfere in the matter if it were not for Rule 111 (3) of the Bankruptcy Rules, 1883, which appears to remove all difficulty. That rule provides that "no appeal shall be brought in respect of the omis-

sion by the Court appealed from to exercise any discretionary power, unless the Court shall, in its judgment, or on application made at the hearing, have expressly refused to exercise such power, in which case the refusal may be made a ground of appeal." The learned judge was expressly desired to exercise the power, and he refused.

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CAVE, J.:

I am of opinion that in this case the order asked for should be Judgment. made, but having regard to the fact that there will be a trial we do not consider it desirable to state any reasons.

WILLS, J., concurred.

Order accordingly.

Solicitors : *Hamlin, Grammer and Hamlin*, for the trustee.
The Solicitor for the Treasury.



IN RE W. J. COX, EX PARTE THE TRUSTEE.

BEFORE
MR. JUSTICE
FIELD.
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IN RE
Jan. 19.

Bankruptcy Act, 1883, Section 24.
Application for the committal of a debtor for contempt in refusing to deliver up possession of premises occupied by him, at the request of the trustee in the bankruptcy. Form of Order.

THIS was an application made to Mr. Justice FIELD, sitting as the Judge in bankruptcy during the absence of Mr. Justice CAVE on circuit, on behalf of the trustee in the bankruptcy of *W. J. Cox*, for the committal to prison of the debtor for contempt of Court in having failed to perform certain duties imposed on him under section 24, sub-sections (2), (3) and (4) of the Bankruptcy Act, 1883, relating to the "duties of a debtor as to the discovery and realization of his property."

The contempt in the present case consisted in the debtor having neglected (1) to deliver up the premises occupied by him to the trustee when so requested: and (2) to attend or wait upon the trustee when required by him so to do.

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F. C. Willis for the trustee.

I will deal first with the first cause of complaint. The facts are very simple. The debtor carried on his business as an upholsterer at 243, Portobello Road, Notting Hill. The trustee in the bankruptcy was appointed, and he has contracted to sell the interest in these premises, together with the fixtures and fittings, to a Mr. Hayward, for 800*l.*, and possession is to be handed over to-morrow, January 20th. The trustee has required the debtor to give up possession that this may be done, but he has obstinately refused.

Sidney Woolf for the bankrupt.

The words of section 24 are "if a debtor wilfully fails to perform the duties required of him." In this case the debtor has been guilty of no wilful default, nor has he neglected to comply with any reasonable request of the trustee.

[FIELD, J. You are bound to give up possession.]

There is the question of reasonable time. The receiving order was made in November last; the notice of the trustee requiring the debtor to give up possession was not given until last Friday week, January 9th. Moreover, I have an affidavit of the debtor showing that the contract alleged to have been entered into by the trustee is a mere sham.

FIELD, J.:

I shall not deal with that. I think the notice was quite sufficient. The trustee cannot be impeded in the performance of his contract. The bankrupt is merely standing out in contumacy. I shall make the order as prayed, but it will not be drawn up if the bankrupt gives up possession by to-morrow morning at eleven o'clock.

Sidney Woolf:

I submit that would not be the proper form. I submit that the order should be an order to deliver up possession, and then if the debtor did not deliver possession he might be committed for contempt. In the case of *In re Pookes Royle* (L. R., 7 Q. B. D. 9), it was held that "the mere fact that a trustee in bankruptcy has within four days after his resignation or removal from office neglected to render the accounts prescribed by the General Rule

126 of the Bankruptcy Act, 1869, is not sufficient ground for his committal to prison by the Court of Bankruptcy as for a contempt. To warrant such committal there must be some evidence that he has after notice from the Court wilfully failed to perform the duties imposed upon him by the rule." That was in the case of a trustee, but the reasoning is the same in a case like the present.

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W. J. COX,
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FIELD, J.:

No. I shall make the order in the terms of the application, but it will not be drawn up if the condition I have stated is complied with.

[Upon the other branch of the motion, an undertaking was given that the bankrupt would attend the next appointment which the trustee might make.]

Solicitors: Brook, Chapman & Co. for the trustee.



IN RE MAUGHAN, EX PARTE THE TRUSTEE.

Bankruptcy Act, 1883, Sections 44, 55, and 168.

BEFORE
MR. JUSTICE
FIELD.
1885.
Jan. 19.

*Disclaimer—Agreement for a Lease—Assignment—Bankruptcy of Assignor—
“Property.”*

Held:—That the word "property" as used in section 55, and as defined in section 168 of the Bankruptcy Act, 1883, is not restricted to "property divisible amongst the creditors" mentioned in section 44, but extends to any kind of property subject to any onerous covenants or obligations which may be vested in the debtor.

THIS was an application on behalf of the trustee under a scheme of arrangement, for leave to disclaim an agreement for a lease of

1885. certain premises situate at 41, Cheapside, in accordance with the provisions of section 55 of the Bankruptcy Act, 1883.
*IN RE
MAUGHAN,
EX PARTES
THE TRUSTEE.*

A receiving order was made against the debtor, *Maughan*, in August, 1884, and the creditors accepted a scheme of arrangement which was duly approved by the Court. This scheme provided, amongst other things, that the property of the debtor, divisible among his creditors under the receiving order, should vest in a trustee, who should administer the property as nearly as might be in the same manner as if the debtor had been adjudicated bankrupt, and one *J. B. Monkhouse*, was subsequently appointed such trustee.

The business premises of the debtor at 41, Cheapside, were held by him under an agreement for a lease bearing date May 6th, 1879, for a term of twenty-one years.

By another agreement, bearing date June 13th, 1884, the debtor had entered into a contract with a company known as *Maughan's Patent Geyser Company*, for the sale to them of his business and patents, and business premises. Neither of these agreements was under seal. Although the debtor had parted with his beneficial interest in the property at the date of the receiving order, he remained liable to the lessors under the covenants in the agreement.

Mr. Holmes, solicitor, now applied on behalf of *J. B. Monkhouse*, the trustee under the scheme, for leave to disclaim the interest of the debtor in the business premises under the agreement of May 6th, 1879.

Sidney Woolf, for *Maughan's Patent Geyser Company*.

E. Cooper Willis, Q.C., for the landlord:

I submit that the trustee cannot disclaim the interest of the debtor in the agreement of May 6th, 1879. In the first place, there is no property to disclaim. Section 55, sub-section (1), provides, that "where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, &c.," the trustee may disclaim. The part of the property must consist of land of some tenure. Here, previous to the receiving order—some two months before—the debtor had assigned to the company. He had entered into an agreement to sell, upon the terms of certain shares being allotted to him, and the company were placed in pos-

session and got all the title the debtor could give. But even if the debtor had any interest left in him he would hold it as trustee for the company. Section 44 of the Act provides, that "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall not comprise the following particulars: (1) Property held by the bankrupt on trust for any other person." The word "property" in section 55 means "property divisible amongst the creditors." The debtor's interest here is not divisible amongst creditors. My argument is, that even if the debtor has any interest, it could only be on the request of the company to call upon the lessors to grant a lease.

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[FIELD, J.: By the agreement between the debtor and the company he is bound to execute all assurances, &c., for vesting the property in the company. He has not done so.]

The debtor then must hold all the interest which he has in trust for the company. In section 168—the interpretation clause of the Act—the term "property" is said to include "money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property, as above defined." The word "property," as used in section 55, and as defined by section 168, means "property divisible amongst the creditors." When the resolutions for the scheme were passed and confirmed the trustee only became trustee of the property divisible amongst the creditors. (*Counsel referred to the case of The East and West India Dock Company v. Hill*, L. R., 22 Ch. Div. 14.)

Sidney Woolf:

The assignees are no longer in possession of the property, and are perfectly willing to give up possession. I may also call your Lordship's attention to the case of *Ex parte Sir W. Hart-Dyke, In re Morrish*, L. R., 22 Ch. Div. 410, where it was held: *Semble*, "That the trustee may also disclaim a lease which has been determined before his appointment." (*Counsel also referred to the case of Walsh v. Lonsdale*, L. R., 21 Ch. Div. 9.)

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FIELD, J.:

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Judgment.

I think that I ought to make this order, and that I have the power to do so. However beneficial such an order might be, if I could agree with the arguments put forward by Mr. *Willis* I should not make it, but I think the true construction of the Act is that this property is such as the trustee is entitled to disclaim. The facts of the case are short. The debtor had, after the execution of the lease in 1879, an estate in him which everybody agrees was burdened with onerous covenants. If it had remained in him till he became bankrupt there is no doubt but that the trustee might have disclaimed. But the debtor has since entered into a contract to assign it in terms large enough to pass all the beneficial interest he had to the company called Maughan's Patent Geyser Company. It left him, however, in this position; he was under the liability to execute further assurances whenever the purchaser asked him to do so. The intention of the legislature on the present Act was, in my opinion, to enlarge the power of disclaimer. Section 55 says, that "where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants" it may be disclaimed. In section 44 we have the property of the bankrupt divisible amongst his creditors, and this property does not include property held in trust. But am I bound to read the word "property" in section 55 as property divisible amongst the creditors? I do not think so, and I am of opinion that the words were purposely omitted. I am bound to give the full definition of the word "property" and not to hamper it. In my opinion, the legislature intended that if there was property burdened with onerous covenants, although not divisible, the trustee might disclaim it. In other words, I am of opinion that the word "property," as used in section 55, and as defined in section 168 of the Act, is not to be restricted to "property divisible amongst the creditors" mentioned in section 44, but extends to any kind of property vested in the debtor subject to any onerous covenants or obligations. Then it is said this is not land. I think it is; and inasmuch as the trustee is under an obligation to the landlord, that he can disclaim. It would be a great pity to cut down a beneficial Act of this description, and I, for my part, am not in-

clined to do so. In my opinion, therefore, the right of disclaimer exists, and leave will be given to the trustee to disclaim.

Leave to disclaim, the trustee and the company undertaking to give up possession. Costs of all parties out of the estate.

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THE TRUSTEE.

Solicitors : *Ingle, Cooper & Holmes*, for the trustee.

Lonley & Morley, for Maughan's Patent Geyser Company.

Hughes, Hooker & Co., for the landlord.

CASES relied upon or referred to :—

The East and West India Dock Company v. Hill, L. R., 22 Ch. Div. 14.

Ex parte Sir W. Hart-Dyke, In re Morrish, L. R., 22 Ch. Div. 410.

Walsh v. Lonsdale, L. R., 21 Ch. Div. 9.

IN RE FOSTER, EX PARTE BASAN.

Bankruptcy Act, 1883, Section 4, Sub-section 1 (g).

Application to set aside bankruptcy notice—Adjournment sine die—Evidence.

A debtor, after the service of a bankruptcy notice upon him under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, commenced an action against his creditor to set aside the judgment on which such notice was founded, and prayed that an account might be taken, and made other claims in the nature of a counterclaim. The debtor delivered the statement of claim in the action, and applied to the Court to dismiss the bankruptcy notice. The registrar, after reading the statement of claim, adjourned the application *sine die*, with liberty to apply.

Held (on appeal) :—That the statement of claim was not evidence; and the registrar, before interfering with the operation of the bankruptcy notice, ought to have been satisfied by evidence that the debtor had at any rate some reasonable ground for bringing the action.

COURT OF
APPEAL.
BEFORE THE
MASTER OF
THE ROLLS,
COTTON, L.J.,
LINDLEY, L.J.
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THIS was an appeal on behalf of *H. Basan*, a creditor, from an order of Mr. Registrar *Brougham*, directing that the application of the debtor, *George Foster*, for the dismissal of a bankruptcy notice against him should be adjourned *sine die*, with liberty to apply.

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The order appealed from was in the following form: "In the matter of a bankruptcy notice by the above-named *Halbert Basan* against the above-named *George Foster*, dated the 23rd September, 1884. Upon the adjourned application of the above-named *George Foster* for the dismissal of the above-mentioned bankruptcy notice, and upon hearing counsel . . . and upon reading the statement of claim in the action brought by the said *George Foster* against the said *Halbert Basan* in the Chancery Division of the High Court of Justice, and admitted by the respondent to have been served in the said action . . . and upon hearing certain correspondence between the said *George Foster*, the said *Halbert Basan*, and one *Peter Bosco*, read. And the said *George Foster* by his counsel undertaking to prosecute the said action brought by him against the said *Halbert Basan* in the Chancery Division of the High Court of Justice with due diligence. It is ordered that the said application be adjourned *sine die*, with liberty to either party to apply to restore the same."

The debtor *Foster* was originally a member of the Stock Exchange, but in the year 1867 he was declared a defaulter, and he had since that time frequently employed the said *H. Basan* as his broker for stocks and shares.

In connection with these proceedings in July, 1882, an I O U for the sum of 2,375*l.* 14*s.* 6*d.* was given by *Foster* to *Basan*, upon which, on May 26th, 1883, final judgment was obtained.

Upon September 23rd, 1884, a bankruptcy notice under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, was served upon the debtor for 2,288*l.* 14*s.* 6*d.* balance of judgment debt then due.

Thereupon the debtor *Foster*, on October 14th, 1884, commenced an action in the Chancery Division of the High Court of Justice, by which he prayed to have the said judgment set aside, and that all proceedings thereon might be stayed pending the taking of accounts—that an account might be taken of what (if anything) was due from the plaintiff to the defendant at the time of the said I O U—and making other claims in the nature of a counterclaim.

The debtor *Foster* subsequently applied that the bankruptcy notice served on him might be dismissed, and upon this appli-

cation on November 4th, 1884, Mr. Registrar *Brougham* made the order above set out.

From this order Mr. *Basan* now appealed.

E. Cooper Willis (Ingle Joyce with him) for the appellant.

The registrar ought to have given a definite decision, and he had no right, under the circumstances, to order an adjournment. The correspondence mentioned in the order was not in evidence. The only real evidence before the registrar was that on October 14, 1884—three weeks after the bankruptcy notice had been served—*Foster* had brought an action in the Chancery Division against Mr. *Basan*, and in that action he claims that the judgment obtained against him should be set aside, and an account taken, and he also claims certain relief against Mr. *Basan*.

[LINDLEY, L. J.: The action impeaches the judgment, I suppose.]

This action was commenced after the bankruptcy notice had been served. My case before the registrar was that, even though an action might be brought, there was no evidence of the truth of the facts alleged in the statement of claim. The letters mentioned in the order were simply referred to by counsel in his opening statement; they were never proved. The registrar cannot take cognizance of letters simply because they are read in the opening of counsel.

[THE MASTER OF THE ROLLS : Was there any dispute as to the truth of the action ?]

Yes. Section 4, sub-section 1 (g), provides that an act of bankruptcy is committed after a bankruptcy notice has been served, unless the debtor shall "either comply with the requirements of the notice, or satisfy the Court that he has a counterclaim, set-off or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained." I submit that what was done did not satisfy the Court. The Court could only be satisfied by proper evidence. It surely is not sufficient for a man to say that since the bankruptcy notice was served, he has thought fit to bring an action. If *Foster* had gone into the box and said the facts in the

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statement of claim were true, it would have been something, but even this was not done. Further, it is a balance of a judgment debt on which the notice is founded, the debtor has paid a part.

[THE MASTER OF THE ROLLS : Did you specifically point out to the registrar that you disputed the authenticity of the letters ?]

I said that I would admit nothing but that an action had been commenced.

[THE MASTER OF THE ROLLS : From the form of the order, it seems to me that you did not make the registrar understand that you objected to the letters.]

The letters were never proved, and no mention of them ought to have been made in the order when it was drawn up. The mere opening speech of counsel is not evidence. I have here an affidavit of what took place.

[THE MASTER OF THE ROLLS : As I understand it, counsel on both sides were present, and there is no necessity for an affidavit of anybody else. We shall not accept it.]

Herbert Reed for the debtor.

The registrar, on making the order, thought it convenient that one Court should settle the matter. If wrong was done to the appellant, he gave him liberty to apply. If on the letters some mistake had been made, the registrar would doubtless on application restore the case. In the Court below I read the letters. The other side did not say they did not admit them to have been written or received. They did say, at the end of the case, that they only admitted that the statement of claim had been delivered. The registrar did not suppose for one moment that it was objected that the letters were not written or received.

[THE MASTER OF THE ROLLS, *after looking at the statement of claim referred to* : As a matter of fact, it appears to me doubtful whether this statement of claim discloses any cause of action.]

If the Court, on hearing correspondence read which is not objected to, thinks a case ought to be adjourned, it is at liberty to make such an order.

[COTTON, L. J.: Where there is no stay of execution, you cannot stop a bankruptcy notice, unless you make out a *prima facie* case. Here there appears to be no *prima facie* case whatever.]

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As a matter of fact, the plaintiff in the action alleges that there never was any value in consideration for the I O U on which judgment was signed, and nothing whatever was then due from him, but that the defendant was considerably indebted to him, and the I O U was wrongfully extorted. In the counterclaim he asserts that the defendant, being employed as broker to buy, sell, and carry over stocks and shares, has in many cases bought from, sold to, and carried over with himself, taking the profits, thus being a principal in the transaction and charging the plaintiff with commission and interest.

[COTTON, L. J.: The question appears to me to be still unanswered, Is it right that a bankruptcy notice should be stayed on a mere piece of pleading?]

The registrar said the facts disclosed by the correspondence ought to be sifted in the other Court.

[THE MASTER OF THE ROLLS: I have here the notes of the registrar, and he says, "It seems to me that, on reading the statement of claim which has been delivered, there is an action pending in another Court which raises a counterclaim, and it would be better that the matter should be tried in the other Court and not here."]

The question was one entirely of discretion, and no appeal ought to have been brought.

THE MASTER OF THE ROLLS (BRETT):

It seems to me, after having read the notes of the registrar, that Judgment. he assumes to act solely on the statement of claim. He appears to have done so solely, and makes no mention of the correspondence. It is not necessary for me to say what course might have been pursued if the letters had been proved to contain evidence in support of the statement of claim, for the registrar says in his notes that his opinion is founded on the statement of claim alone. Now the statement of claim is no evidence of anything. It is a strange

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one, and a doubt arises in my mind whether it discloses any cause of action at all. It may be that it contains a valid counterclaim; but even if it in this respect fulfils all the requirements necessary, if the registrar acts merely on the facts stated in the statement of claim, he has no evidence. He ought to have had, by affidavit or otherwise, some real evidence to show him that there is a reasonable ground for instituting such an action as is maintained in the counterclaim. He can only come to that conclusion upon evidence. I am of opinion that in this case the registrar has been too hasty, and that the order ought to be set aside. The matter must be referred back to the registrar, with costs.

COTTON, L. J.:

I am also of opinion that the registrar has not sufficiently considered the nature of the statement of claim. I do not say that it is so in this case, but a statement of claim may be a mere invention. If a counterclaim is put forward which could not be set up in the action in which the judgment was obtained, it would doubtless not be wrong in the registrar to let the decision be taken in another Court, but he ought to examine into it, and if the claim appears to be a shadowy one this course ought not to be taken.

LINDLEY, L. J.:

It seems to me that the registrar has really adjourned this case without any evidence at all. He has come to the conclusion that the statement of claim delivered in an action in the Chancery Division shows good ground to set aside the judgment. But there must be some evidence in support of it, and as this was not given, I am of opinion that the case must be referred back to the registrar, and the appeal allowed with costs.

Order accordingly.

Solicitors : *Coburn & Young* for the appellant.
Goldberg & Langdon for the debtor.

IN RE PARK, EX PARTE KOSTER.

COURT OF
APPEAL.

*Judgment Summons—Order for Payment by Instalments—“Means to pay”—
The Debtors Act, 1869, Section 5, Sub-section (2)—Refusal to commit.*

BEFORE THE
MASTER OF
THE ROLLS,
COTTON, L.J.,
LINDLEY, L.J.

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THIS was an appeal against an order made by Mr. Justice CAVE in Chambers, on November 15th last, whereby he dismissed an application on behalf of the appellant *Koster*, for the committal to prison of the debtor *J. A. Park*, under the following circumstances:—

On October 13th, 1883, a judgment for the sum of 125*l.* 1*s.* 8*d.* and 3*l.* 14*s.* costs, was obtained against the debtor, and on his neglecting to pay the same a judgment summons was taken out against him on December 17th, 1883, upon which an order was made by Master Dodson for the payment of 5*l.* a month. This order was not complied with, however, and on April 5th, 1884, a summons was taken out for default in four instalments, which was heard by Mr. Registrar *Hazlitt*, and adjourned by him to Mr. Justice MATHEW, who was then acting as the bankruptcy Judge, and by whom an order for committal was made on May 10th, such order not to be drawn up if 10*l.* was paid within a month. This sum not being paid, the order was drawn up on July 9th, and the debtor was arrested on July 12th, but released on July 17th on payment of 20*l.*

On September 1st 25*l.* was due, and a summons was taken out on September 9th, which came on for hearing before Mr. Registrar *Brougham* on October 13th, and was adjourned to November 5th, when evidence having been tendered to show that the debtor had received 60*l.* since the order in July, the matter was referred to the judge.

On application to Mr. Justice CAVE, however, an order for committal was refused, and from this refusal Mr. *Koster* now appealed.

F. C. Willis for the appellant:

I submit that the learned judge took a wrong view. The debtor had an allowance of 5*l.* a week from his brother. The reason Mr. Justice CAVE refused the order appeared to be that, inasmuch as

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this 5*l.* a week was a free gratuity which could be stopped at any time, it did not come within the word "means." As a matter of fact it came to this, that in order to have means the debtor must earn the money.

[THE MASTER OF THE ROLLS: I do not see that. All you showed was this allowance of 5*l.* from the debtor's brother to keep him from starving. Where was he to get the money to pay your debt?]

The question was whether he had had the means of paying the money. Section 5, sub-section (2) of the Debtors Act, 1869, with regard to committal, provides "that such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same."

[THE MASTER OF THE ROLLS: What is the use of the order; you could not get the money the man had spent. It is simply using the Act to put a screw on the brother.]

The creditor is an hotel proprietor, and the debtor was permitted to incur the debt on the faith of this allowance of the brother. He has had means, and either the Act is to have effect or it is not.

The defendant *Park* was present, but was not represented by counsel.

THE MASTER OF THE ROLLS (BRETT):

Judgment. With regard to this case I will say nothing but this, that the appellant has not satisfied me that Mr. Justice CAVE was wrong in saying that the debtor had not had the means to pay the debt.

COTTON, L. J.:

I do not know what rule Mr. Justice CAVE may have laid down in coming to his decision. From the Act, if a debtor has had means to pay the debt from any source, I should think he might be sent to prison. In the present case, however, I cannot say that I am satisfied this was the case.

LINDLEY, L. J.:

All we have to consider is, whether the debtor has or has had the means to pay. If so, it appears to me immaterial where he got them, whether from charity or not. Here it is stated the debtor had a gratuitous allowance of 5*l.* a week from his brother, and the question is, Is that sufficient? I am not satisfied upon this point, and the appeal must therefore be dismissed.

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Appeal dismissed.

Solicitor : *W. F. Stokes* for the appellant.



IN RE YOUNG, EX PARTE YOUNG.

COURT OF
APPEAL.

Bankruptcy Act, 1883, Section 18.

BEFORE THE
MASTER OF
THE ROLLS,
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Composition or Scheme of Arrangement—Refusal of Court to approve—Rash and hazardous Speculations.

In a case where a debtor, as the managing director of a mining company, the mines being undeveloped, advanced both his own and borrowed money to the company, which subsequently became insolvent, and a petition in bankruptcy was presented against the debtor, and a composition accepted by his creditors.

Held :—That the debtor had been guilty of rash and hazardous speculations; and that the registrar was quite right in refusing to approve the composition offered.

THIS was an appeal on behalf of the debtor from an order of Mr. Registrar *Pepys*, by which he refused to approve a scheme of arrangement of the debtor's affairs, which had been accepted by the creditors under section 18 of the Bankruptcy Act, 1883.

Sub-section (5) of section 18 provides that “The Court shall, before approving a composition or scheme, hear a report of the official receiver as to the terms of the composition or scheme, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor.”

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And by sub-section (6), "If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required under this Act, where the debtor is adjudged bankrupt, to refuse his discharge, the Court shall, or if any such facts are proved as would, under this Act, justify the Court in refusing, qualifying, or suspending the debtor's discharge (*see Bankruptcy Act, 1883, Section 28, sub-sections (2) and (3)*), the Court may, in its discretion, refuse to approve the composition or scheme."

On July 28th, 1884, a receiving order was made against the debtor *Young*, on a creditor's petition, and on September 1st the statutory meeting of creditors was held, at which resolutions were passed accepting an offer made by the debtor to pay 1s. in the pound within two months, such payment to be secured by the joint and several promissory note of himself and his mother.

On September 9th the debtor passed his public examination without opposition, and on September 29th, the resolutions passed on September 1st were confirmed at a subsequent meeting of the creditors in accordance with section 18, sub-section (2) of the Act.

On November 18th application was made to the Court for its approval, when the report of the official receiver was presented.

This report was to the effect that the debts amounted to 3,806*l.*, the assets to 5*l.*, so that something like 190*l.* would be required to carry out the scheme which was so far calculated to be for the benefit of the creditors. But it was shown that the debtor had been intimately connected with certain companies formed for the working of lead mines, to which he had made advances to the extent of more than 5,000*l.*, and it was suggested that this amounted to rash and hazardous speculations under the provisions of the Act. Further, no proper books had been kept by the debtor.

After hearing the report, and upon the ground that the debtor had been guilty of rash and hazardous speculations, the learned registrar refused his approval.

From this refusal the debtor now appealed.

Lee Roberts for the appellant:

The debtor passed his public examination without opposition,

and then when he came to the Court for its approval of the scheme already accepted by the creditors, he was met with this report of the official receiver upon the strength of which the necessary sanction was refused. The losses were in connection with the T—— Silver, Lead and Copper Mining Company. The advances were made to the company because Mr. Young firmly believed that a far larger sum was due to the company. That was the fact, but unfortunately the person who owed the debt to the company died insolvent. I submit that the circumstances justified Mr. Young in lending the money to the company, of which he was the managing director, and do not amount to rash and hazardous speculations.

[LINDLEY, L. J.: He seems to have been financing the company.]

If Mr. Young made the advances *bond fide* and believed that this debtor of the company, who owed to it 10,500*l.*, was solvent, his conduct cannot be called rash and hazardous. A portion of the money he advanced was obtained from his mother, and he would not have gone to her for this purpose if he had thought the investment insecure. He had about 3,000 shares in the company.

[LINDLEY, L. J.: Here is this man who was managing director and had all these shares going on advancing money in the hopes that the shares might rise. Is not that speculation?]

I submit not necessarily so. In section 159 of the Bankruptcy Act, 1861; the words used were "attributable to rash and hazardous speculations." Under that Act it was decided in the case of *Ex parte Downman*, *In re Downman* (32 L. J., Bank. 49) that "a speculation is not rash and hazardous within the meaning of the 159th section of the Bankruptcy Act, 1861; unless it is not only dangerous, but such as no reasonable man would enter into." Lord Chancellor WESTBURY, in his judgment said, " * * * * the next question was whether these contracts, though *bond fide* entered into, did not deserve the name of rash and hazardous speculations. It was extremely difficult to assign anything like the limit that might be put upon language of that general character, which unfortunately had been introduced into the clause, and the form

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of which it was necessary to use, but which were so painfully indefinite as to leave the judge a large amount of discretionary power, which might frequently lead to the decisions of one judge being at variance with those of another. A gentleman contracted with the owner of a mine to give him a sum of money for the mine, the contract being dependent on the formation of a company. This was such a transaction as was frequently entered into, and flourishing concerns beneficial to all parties frequently originated in this way. He could not say that a transaction of that kind, apparently *bona fide* in this sense, that the scheme was practicable and capable of being fairly and honestly brought into operation, was to be branded with the name of a rash and hazardous speculation. There might no doubt be great danger in it, inasmuch as success was not certain, but in order to bring it within the condemnatory clauses of the Act, it would be necessary to find that it was not only a speculation, but a rash speculation, and a hazardous speculation. Probably the important word in the clause was 'rash,' that is, such a speculation as no reasonable man would enter into."

[THE MASTER OF THE ROLLS: Just so. There is the difficulty. What did the Lord Chancellor mean by the term "reasonable man"?]

In the present case, at any rate, there was not such a speculation as no reasonable man would enter into. If at the time when he made the advances the debtor firmly believed that the creditor of the company would pay, his conduct cannot be called rash and hazardous.

Muir Mackenzie, for the official receiver, was not called upon.

THE MASTER OF THE ROLLS (BRETT):

Judgment.

It would be very rash for me to venture to give an exhaustive definition of the term "rash and hazardous speculations." More especially when a learned Lord Chancellor has attempted to do so, and in my opinion has not succeeded in doing it very well. The question here is, Was this man doing a reasonable thing or not? He was the managing director of a mine to be worked. He knew

its position, and he advanced money to finance it nearly till it stopped. He seems to have advanced all his own money and something like 2,000*l.* of his mother's money. This he advanced to a company in reality not yet developed ; a very small amount of ore had in reality been obtained. He must have known that it might stop at any time, and it did stop. How can it be said that this was not a speculation ? I will give no further definition than in the ordinary acceptation of the word as distinguished from reasonable prudence it was a rash speculation. In my opinion the order of the registrar was perfectly right.

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COTTON, L. J. :

I am of the same opinion. The working of a silver, lead and copper mine is in my opinion essentially a matter of speculation. This man took shares ; he advanced not only his own means but also his mother's. I will make no attempt to define what may be considered a rash and hazardous speculation, but in my opinion this most certainly was one.

LINDLEY, L. J. :

If this was not a rash and hazardous speculation, I do not know what is. In my opinion the order of the registrar was a right order, and the appeal must be dismissed.

Appeal dismissed.

Solicitors : *Timbrell & Westbrook* for the appellant.

W. W. Aldridge for the official receiver.

CASE relied on :—

Ex parte Downman, In re Downman, 32 L. J., Bank. 49.



COURT OF
APPEAL.

**IN RE WHITE, WINTER & Co., EX PARTE WHITE,
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BEFORE THE
MASTER OF
THE ROLLS,

COTTON, L.J., Discharge upon Condition—Contracting Debts without reasonable Expectation of
LINDLEY, L.J. Payment—Costs of Official Receiver.

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Jan. 23.

The debtors commenced business by means of borrowed money, and assigned as security to the lender their leasehold premises, goodwill, and all existing and after-acquired stock in trade. The mortgagee subsequently took possession under this deed, and the debtors became bankrupt, nothing being left for the general creditors.

Held :—That the debtors had contracted debts without having any reasonable or probable ground of expectation of being able to pay them ; and that the order of the registrar granting a discharge only upon the terms of judgment being entered up against the bankrupts for the full amount of the debts provable in the bankruptcy, was a right order.

THIS was an appeal on behalf of the bankrupts Messrs. *White, Winter & Co.*, from an order of Mr. Registrar *Pepys*, by which he granted their discharge only “upon the terms of judgment being entered up against the bankrupts for the full amount of the debts provable in the bankruptcy ; such judgment to be enforced at the discretion of the Court.”

The bankrupts, who were decorators and designers in Percy Street, Rathbone Place, commenced business some years ago by means of borrowed money, assigning to the lender *A. O. Bayly*, as security, their leasehold premises, the goodwill of their business, and all their existing and after-acquired stock in trade and other assets, and giving him power to take possession at any time. Interest was payable on the advance, and two-fifths of the profits of the business were to be applied in paying off the mortgage.

In May 1883, *A. O. Bayly* became dissatisfied with the manner in which the business was being carried on, and, in consequence, he commenced an action against the bankrupts for the purpose of enforcing his security.

This action was defended by the bankrupts, it being alleged by them (1) that the deed had been obtained from them by misrepresentation, and that they were ignorant of its contents ; (2) that there was a distinct arrangement when the money was lent that it

was not to be called in for ten years. After considerable litigation in the Chancery Division, however, *Bayly* obtained possession of the property.

Messrs. *White, Winter & Co.* were subsequently adjudicated bankrupt, their statement of affairs showing liabilities amounting to £1,588*l.*, without available assets, nothing being left for the general creditors, and on application being made by them for discharge, the official receiver submitted in his report that, inasmuch as the bankrupts mortgaged the whole of their property in August, 1880, they had incurred debts without having any reasonable expectation of being able to pay them, and were, therefore, not entitled to a full discharge. (*See the Bankruptcy Act, 1883, Section 28.*) The trustee in the bankruptcy also opposed.

1885.
IN RE WHITE,
WINTER & CO.,
EX PARTE
WHITE,
WINTER & CO.

The learned registrar, after taking time to consider, delivered judgment to the effect—that the bankrupts had not, in his opinion, relieved themselves from the responsibility of executing a deed by which they divested themselves of the whole of their property, and persons who carried on business on such terms exposed themselves to the censure of the Court. There was nothing to show that Mr. *Bayly*, the mortgagee, had acted improperly in any way, and if the bankrupts chose to execute a deed in ignorance of its contents, they must be held responsible to the creditors. They were bound hand and foot by the deed, and yet they went on incurring debts. Having regard to the circumstances in which the bankrupts were placed, they had, in his opinion, contracted debts without reasonable expectation of payment. In due time the crash came, and the mortgagee took possession of the whole of the property, nothing being left for the general creditors. Under these circumstances the discharge could only be granted upon the terms of judgment being entered up against the bankrupts for the full amount of the debts provable in the bankruptcy; such judgment to be enforced at the discretion of the Court.

From this decision the bankrupts now appealed.

Stanley Boulter for the appellants:

I submit that the discharge ought to have been granted without any condition whatever. The business went on and was successful until May, 1883, when *Bayly* commenced his action.

1885. [THE MASTER OF THE ROLLS: Do you gainsay the statement
 IN RE WHITE, of the registrar that Mr. *Bayly* did not act improperly in any
 WINTER & CO., way?] Ex parte

WHITE,
 WINTER & CO. There was a distinct arrangement when the money was lent that it was not to be called in for ten years. At the time of the commencement of the Chancery proceedings the business was in a position to pay 20s. in the pound. As soon as a receiver was appointed the business fell off naturally.

Herbert Reed for the trustee,

Winslow, Q.C. (*Frank Evans* with him), for Mr. *Bayly*,

Muir Mackensie for the official receiver, were not called upon.

THE MASTER OF THE ROLLS (BRETT) :

Judgment. I am clearly of opinion that the judgment of the registrar was right. The bankrupts went into business without capital, and in order to carry on business they gave to the person who advanced the capital the right to seize all their assets. They ought to have seen that that creditor might at once seize and stop the whole business. The registrar was perfectly right in making the order which he did, and I fail to see how he could have acted otherwise.

COTTON, L. J. :

I entirely agree. It is true there is some dispute as to the terms of the agreement between the bankrupts and *Bayly*, but, if so, I cannot see the registrar was wrong. It is clear the bankrupts mortgaged everything they had, and the course taken by them was utterly unreasonable.

LINDLEY, L. J. :

There cannot be the slightest doubt but that the order made by the registrar was a right order, and the appeal must therefore be dismissed.

Appeal dismissed.

Muir Mackenzie, who appeared for the official receiver, asked for his costs.

COTTON, L. J.:

1885.

It is altogether contrary to the practice of the Court to give any costs to the official receiver where his appearing is not essential. In this case the appearance of the official receiver was not necessary, and the application will be refused.

*In re White,
Winter & Co.,
Ex parte
White,
Winter & Co.*

Solicitors: *W. E. Ruddle* for the bankrupts.

Thomson, Son & Brooks for the trustee.

Coombs, Bayly & Henley for Mr. Bayly.

W. W. Aldridge for the official receiver.

PRACTICE.

IN RE BINKO.

Bankruptcy Act, 1883, Section 28.

BEFORE MR.
REGISTRAR
MURRAY.

1885.

Discharge—Previous Liquidation under which Discharge not granted.

Jan. 14 & 31.

On the application of the bankrupt for his discharge the official receiver reported that the bankrupt had previously filed a petition for liquidation of his affairs, under which his discharge had not been granted.

Held :—That the practice of the Court is, that when an undischarged bankrupt makes an application for his discharge under a second bankruptcy, the Court will not entertain the application until he has purged himself of his former bankruptcy; and it appearing that the bankrupt had not obtained his discharge under the liquidation petition referred to in the report of the official receiver, the application would be adjourned *sine die* with liberty to apply.

THIS was an application for an order of discharge.

The debtor, *H. B. Binko*, was a chemical manufacturer and inventor, carrying on business in Roscoe Street, Bunhill Row, under the firm of *Binko & Co.*

The receiving order was made in September last, the liabilities being returned at 3,535*l.*, and the assets at 219*l.* The bankrupt now applied for his discharge.

The report of the official receiver stated that the books of the bankrupt did not sufficiently disclose his business transactions and

1885. financial position within the three years immediately preceding his
In re Birko. bankruptcy. Further, that in March, 1871, the bankrupt had filed a petition for liquidation of his affairs, his liabilities then being £2,302*l.*, with assets 114*l.* : and his discharge under that liquidation had not been granted.

Under these circumstances the official receiver submitted that the order of discharge under the present bankruptcy, if granted, ought not to be absolute, but that at any rate some condition should be attached to it.

The discharge was also opposed by certain creditors, on the ground that the bankrupt had contracted debts without reasonable expectation of payment, and had vexatiously defended a certain action brought against him.

Sidney Woolf for the bankrupt.

W. W. Aldridge (the official solicitor) for the official receiver.

Israel Davis & Foster (solicitors) for opposing creditors.

Sidney Woolf:

The grounds in the report of the official receiver appear to be two: (1) That the bankrupt has not kept proper books; and (2) that he presented a liquidation petition in 1871, under which he has not obtained his discharge. Now I contend at once that the quasi-penal provisions of section 28 of the Bankruptcy Act, 1883, are not retrospective or retroactive in their operation. The fact that these sub-sections cannot be retrospective or retroactive is emphasized by the grounds taken in the report. To say that a man is to be made liable in 1885 for an act which is made an offence in 1883, and which was committed in 1871, is contrary to every principle of legislation. Certain words in a report of the case of *In re Rogers, Ex parte Rogers* (L. R., 13 Q. B. D. 438), have been quoted against me. But that case was a case of a composition, and there is an absolute discretion in the Court whether it will give its approval. It is clear that the point was never argued, and if it is a decision at all on section 28 (which I deny), it is entirely in conflict with a case under the Bankruptcy Act, 1861. In the case of *Ex parte White* (19 L. T. 702), it was decided that section 159 of the Bankruptcy Act, 1861, had no retrospective effect.

[MURRAY, REGISTRAR: Your argument is, that until the expiration of three years from the passing or coming into operation of the Act of 1883, no charge can be brought against the debtor for not having kept books to show his financial position for three years.]

1885.
IN RE BINKO.

Yes. It is a penal clause, and it would be monstrous otherwise. If otherwise, it would be to say to a man, " You shall be punished for not doing an act for three years, during which the not doing the act was not an offence." During the three years the man did not know he was committing an offence. Now, as to subsection 2 (g) of section 28, which puts as one of these obstacles to a discharge "that the bankrupt has on any previous occasion been adjudged bankrupt, or made a statutory composition or arrangement with his creditors," if the legislature had intended it to extend to a liquidation in 1871 it would have said so.

[MURRAY, REGISTRAR: Take sub-section (h). Is not that to operate if there has been fraudulent breach of trust before 1883?]

There are other provisions for the punishment of that offence. If these provisions are penal clauses they come within *Ex parte White*. Even if your Honour is against me on this point, then I submit that it constitutes an important element as to any punishment which might be inflicted, whether the offence was committed when it was no offence by law, or committed since the Act came into operation.

Now as to the other question, that the Court cannot grant a discharge when no discharge has been granted under another bankruptcy, I know of no case which supports such a proposition. Section 28, sub-section (1), says, " A bankrupt may, at any time after being adjudged bankrupt, apply to the Court for an order of discharge," &c.

[MURRAY, REGISTRAR: So far as I remember, the practice has been (and it is a practice never deviated from) that when it is discovered that a debtor has been previously bankrupt and not taken his discharge, the case was invariably adjourned, generally with liberty to renew the application when the discharge under the former act could be produced. My own experience goes back twenty years, but I have consulted others who have been here even

1885. longer, and they say the same thing. The *cursus curiae* is, in my opinion, as binding on me as a judicial decision.]
In re Binko.

The old practice can have nothing to do with the Act of 1883. It is inconsistent with section 28. If you refuse to give a discharge until a debtor has got his previous discharge, it is tantamount to refusing altogether, which is only to be done if a debtor is guilty of certain offences under the Debtors Act. The case of *Ex parte Ford, In re Caughey* (L. R., 1 Ch. D. 521) shows there was no such rule under the Act of 1869.

[MURRAY, REGISTRAR : That was a liquidation.]

It will put a new penalty on a debtor. If a debtor has to go to his creditors under the Act of 1869 and tell them he cannot get his discharge under the Act of 1883 until they have given him a discharge, they are sure to put any number of conditions upon it. I submit there is no warrant for this; the debtor has an absolute right under the Act of 1883 to demand and obtain his discharge if he has committed no offence under the Act.

MURRAY, REGISTRAR :

Judgment.

If I had known more of this case on the last occasion when it was before me, I should have taken the same course as I propose to do to-day. I should have decided to adjourn the case. An order of discharge seems to me to be quite impossible. Some offences do appear to have been committed, but as to whether the provisions of the Act are retrospective or not I shall give no opinion now. It will require very careful consideration, and if it is clear that the offences have been committed there will arise the question on what conditions a discharge ought to be granted. Meanwhile I purpose to follow the practice which has prevailed in this Court for many years. When an undischarged bankrupt comes up before it to ask for his discharge under a second bankruptcy, the Court will not deal with the case until he has purged himself from the former bankruptcy. The *cursus curiae* is binding on me, and I shall act on it in this and in all other cases of a like nature until I am set right by a higher tribunal. I shall adjourn generally with liberty to apply. I do not look upon it in the light of a fresh penalty : the question is, whether the bankrupt in

the present case is in a position to ask for his discharge. I have considered the matter carefully myself, and I may say also that my opinion is supported by those of the other registrars whom I have consulted. The practice is invariable, that the Court will not listen to an application like this until it is satisfied that the bankrupt has taken up his discharge from the former bankruptcy. The order therefore will be: "It appearing that the bankrupt has not obtained his discharge under the proceedings mentioned in the report of the official receiver, the Court doth adjourn the application *sine die* with liberty to apply."

1885.
IN RE BINKO.

Order accordingly.

Cases relied upon or referred to:—

- In re Rogers, Ex parte Rogers*, L. R., 13 Q. B. D. 438.
Ex parte White, 19 L. T. 702.
Ex parte Ford, In re Caughey, L. R., 1 Ch. D. 521.

IN RE T. DU BOULAY.

Bankruptcy Act, 1883, Section 28.

Application for discharge. Contracting debts without reasonable expectation of payment. Fraud.

BEFORE MR.
REGISTRAR
BROUGHAM.
1885.
Feb. 6.

THIS was an application for an order of discharge.

A receiving order was made against the bankrupt, *T. du Boulay*, who formerly carried on business as a merchant at 3, Salter's Hall Court, under the firm of Du Boulay, Mackay & Co., in November, 1884.

The liabilities amounted to 64,774*l.*, and the assets were estimated to realize 8,164*l.*, after deducting certain preferential claims.

The bankrupt, who attributed his failure and deficiency to heavy losses and liabilities arising from the fall in the price of sugar, now applied for his discharge.

Attlee (solicitor) for the bankrupt.

1885.

In re
T. du Boulay. *Lawrence (solicitor) for the petitioning creditors.*
 I appear on behalf of the General Credit and Discount Company, Limited, who are creditors for 17,000*l.* I submit that the bankrupt is not entitled to an immediate and unconditional order.

[*BROUGHAM, REGISTRAR:* What offence do you say the bankrupt has committed?]

I say, first, that the bankrupt contracted his debt with the company without any reasonable or probable expectation of being able to pay it; and I say further, that he made such representations to them as amounted to a fraud. The 17,000*l.* is due upon bills of exchange drawn by the bankrupt, and accepted by Messrs. Kemble & Co., and given to the company for discount. These bills purported to be drawn against produce, although the produce was not actually in existence at the time. They were discounted upon the understanding that they were covered by produce. It appeared afterwards, however, that the produce was dependent upon the crops, and was not forthcoming when the bills became due.

[*John R. Macdonald, the manager of the General Credit and Discount Company, Limited, was examined, and said:*—From his experience of something like twenty years, when bills were drawn against produce, the understanding was that there was produce at the back of the bills. When the bills were brought for discount he relied upon the statements appearing on them. He believed that produce was in fact in existence at the time, and was available for the purpose of meeting the bills. In the ordinary course of business the bankrupt led him to believe there was produce. In June, 1884, the bankrupt told him there was a deficiency to the extent of 3,000*l.* or 4,000*l.*, and he expressed his surprise. *On cross-examination the witness said:*—When he re-discounted some of the bills, he did not previously enquire whether the produce was in existence. He was aware that between July, 1883, and July, 1884, there was an unprecedented fall in the price of sugar, to the extent of something like 50 per cent. He considered that the bills were safe, and he relied upon the names on them, and that they were drawn against produce.]

The bankrupt, *T. du Boulay*, was examined, and stated that it was the ordinary custom of West India merchants to make ad-

vances to planters, and he had made advances to various planters in anticipation of produce to come forward. Messrs. Kemble & Co., Colonial brokers, made advances to him, and they were to be recouped out of the proceeds of the sale. It was quite usual for Colonial brokers to make advances to West India merchants upon those terms. When he discounted the bills he certainly believed there would be sufficient produce to meet them. The sudden and unprecedented fall in the price of sugar occurred, however, and for that reason the bills could not be met.

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IN RE
T. DU BOULAY.

[BROUGHAM, REGISTRAR. What view does the trustee take of these transactions ?]

The trustee (Mr. J. Young) stated that in his opinion the case was one of pure misfortune, resulting from the great depression in the sugar market. He was satisfied with the conduct of the bankrupt, and did not oppose his discharge.

W. W. Aldridge, the official solicitor, read the report of the official receiver, which did not allege that the bankrupt had committed any statutory offence.

BROUGHAM, REGISTRAR:

I am of opinion that the bankrupt is, in this case, entitled to Judgment. have his discharge. It appears clear to me that the opposing creditors have not succeeded in proving that the bankrupt has been guilty of any fraud or fraudulent misrepresentation. The evidence shows that he advanced money to the planters, and the bills were given in respect of produce to come forward, but there is no evidence of any fraud. As a matter of fact, produce did arrive to meet a large number of the bills originally given, and everything tends to show that but for the fall in the price of sugar, there was ample to meet all the acceptances as they became due. So far as I can see it is a case of pure misfortune. The charges made by the petitioning creditors have not been established, and their opposition must fail. The bankrupt will therefore be granted an unconditional order of discharge.

Order of discharge granted accordingly.

COURT OF
APPEAL.

BEFORE
THE LORD
CHANCELLOR,
THE MASTER
OF THE ROLLS,
COTTON, L.J.
1885.

Feb. 13.

IN RE FAITHFULL, EX PARTE MOORE.

Bankruptcy Act, 1883, Section 4, sub-section 1 (g).

Bankruptcy Notice :—“Final Judgment.”

Where, in consequence of a breach of covenant of articles of partnership, an action was brought in the Chancery Division and judgment obtained, restraining the defendant from carrying on business within a certain radius—dissolving the partnership—ordering an enquiry as to the amount of damage sustained by the plaintiff—and further ordering the costs of the defendant to be paid—and pending the enquiry as to the damages, the costs were taxed, and only a portion being paid, a bankruptcy notice was served on the debtor under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, for the remainder.

Held: (1) That the sum in respect of which the bankruptcy notice was served was due under a final judgment within the meaning of the section, the amount in question being wholly independent of the result of the enquiry.

(2) That the words “a creditor” in section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, mean a creditor under or by means of a final judgment.

THIS was an appeal from an order of Mr. Registrar BROUGHAM, dismissing a bankruptcy notice.

The facts of the case were as follows :—

The appellant, *Robert Bendale Moore*, had carried on business with the debtor, *R. C. Faithfull*, in Liverpool, as solicitors under articles of partnership which contained, amongst other things, a covenant that *Faithfull* would not establish a business on his own account within a certain radius.

This covenant was broken by *Faithfull*, who established himself with a man named *Isaac* within the limited district.

An action was thereupon commenced by *Moore*, by which he claimed

(1) An injunction to restrain the defendant, *R. C. Faithfull*, from carrying on the business of a solicitor, advocate, and conveyancer, in partnership with the defendant, *J. N. Isaac*, in the city of Liverpool, or within ten miles thereof, or from otherwise practising or carrying on such business in violation of the covenant in that behalf contained in the articles of partnership of July 14th, 1882.

- (2) An injunction to restrain the defendant, *J. N. Isaac*, from issuing circulars stating that he is carrying on business in Liverpool in partnership with *R. C. Faithfull*.
- (3) Dissolution according to the terms of the articles of partnership.
- (4) Accounts and enquiries.
- (5) Damages.
- (6) Costs.

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 EX PARTE
 MOORE.

The defendant having made default in pleading, judgment was given for the plaintiff with costs, as follows:—"Upon motion for judgment on the default of the defendants in delivering a defence, this day made, &c. . . . This Court doth order and adjudge that the defendant, Richard Chamberlain Faithfull, be perpetually restrained from carrying on the business of a solicitor, advocate, and conveyancer in partnership with the defendant, Joseph Napoleon Isaac, in the city of Liverpool, or within ten miles thereof, or from otherwise practising or carrying on such business in violation of the covenant in that behalf contained in the articles of partnership dated the 14th of July, 1882, in the statement of claim mentioned, and the defendant Joseph Napoleon Isaac by his counsel undertaking not to issue circulars stating that he is carrying on business in Liverpool in partnership with the defendant Richard Chamberlain Faithfull, and not to otherwise represent that the defendant Richard Chamberlain Faithfull is carrying on business in Liverpool in violation of the covenant in that behalf contained in the articles of partnership of the 14th July, 1882. This Court doth declare that the partnership between the plaintiff and the defendant Richard Chamberlain Faithfull in the statement of claim mentioned ought to stand and be dissolved as from the 24th day of August, 1883, the date of the notice in accordance with the articles of partnership in the statement of claim mentioned. And doth order and decree the same accordingly, and it is ordered that an enquiry be made what is the amount of damages which the plaintiff has sustained by reason of the breach of covenant by the defendant Richard Chamberlain Faithfull in the statement of claim mentioned. And it is ordered that the defendant Richard Chamberlain Faithfull do within fourteen days from the date of the chief clerk's certificate pay to the plaintiff, Robert Bendle Moore,

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IN RE
FAITHFULL,
EX PARTE
MOORE.

the amount of such damages when ascertained and certified. And it is ordered that the defendants, Richard Chamberlain Faithfull, Joseph Napoleon Isaac, do pay to the plaintiff, Robert Bendle Moore, his costs of the application for the restraining order of the 6th of August, 1883, and the costs of this action, except that, as to the costs of the action, the defendant Joseph Napoleon Isaac is only to pay such part of the general costs of the action as relate to the injunction sought against him, such costs to be taxed and certified by the taxing master."

Pending the enquiry as to the damages the costs were taxed, but only a portion of them were paid, and the remainder not being forthcoming, a bankruptcy notice was served by Moore upon Faithfull under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883.

Application was thereupon made by Faithfull to Mr. Registrar BROUGHAM, to discharge this notice on the grounds (1) that the judgment in respect of which the notice was issued was not a final judgment within the meaning of the section; and (2) that there was a counterclaim which exceeded the balance of the claim.

The learned registrar allowed the application, and dismissed the bankruptcy notice on the first of these grounds.

From this decision Mr. Moore now appealed.

Romer, Q.C. (F. C. Willis with him) for the appellant :

The case raises a question of some importance as to the meaning of "final judgment" in section 4, sub-section 1 (g). The question is, whether this judgment for costs is such a judgment as to support a bankruptcy notice. The registrar decided that it was not. He said the case was covered by authority; but I shall show that those authorities are entirely distinct from the present case. Section 4, sub-section 1 (g), provides that a debtor commits an act of bankruptcy "if a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him . . . a bankruptcy notice requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it, and he does not . . . either comply with the requirements of the notice, or satisfy the Court that he has a counterclaim, set-off, or cross-

demand, which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained." The registrar, in dismissing the notice, founded his opinion, I understand, upon two grounds, (1) that the judgment could not be said to be final, inasmuch as the enquiry as to damages was pending ; and (2), that there was no previous liability which was enforced by the judgment.

[THE MASTER OF THE ROLLS : Is an order to pay costs such a final judgment as is contemplated by the section ? Does it not seem rather to contemplate a judgment in the action and not a mere order for costs ?]

Execution could issue on this judgment. Clearly an enquiry as to damages does not prevent the judgment being final. In the case of *The Duke of Beaufort v. Phillips* (1 De G. & S. 321), there was a decree for specific performance, with references to the master to compute interest and tax costs, and ordering defendant to pay the purchase-money and interest and costs when ascertained. It was held to constitute a judgment debt. But the cases which have been decided on this section, and on which the registrar relied, are three in number. The first is, *In re Chinery, Ex parte Chinery* (see *ante*, Volume I., p. 31, L. R., 12 Q. B. D. 342), where it was held that a garnishee order absolute was not a final judgment against the garnishee within the section, so as to make the failure to comply with a bankruptcy notice founded upon it an act of bankruptcy on the part of the garnishee ; and it was held further, that the words "final judgment" in the section must be construed in their strict technical sense of a judgment in an action which established a liability previously existing of a debtor to a creditor. The next case is, *In re Cohen, Ex parte Schmitz* (see *ante*, Volume I., p. 55, L. R., 12 Q. B. D. 509), where it was held, "that the fact that an order has been made against a defendant requiring him to pay the taxed costs in an action within a specified time, does not constitute such order a 'final judgment' within the meaning of section 4, sub-section 1 (g), so as to entitle the plaintiff, in the event of the defendant failing to comply with the terms of the order, to obtain a bankruptcy notice against the defendant founded on the order." But that case is distinguishable from this. The

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only other case is, *In re Sanders, Ex parte Whinney* (see *ante*, Volume I., p. 185, L. R., 13 Q. B. D. 436), which decided "that a balance order made in the voluntary winding-up of a company, whereby a contributor was ordered to pay in to the liquidator certain calls made in respect of the said company before the commencement of the winding-up, is not a final judgment," within the section. So far as the authorities go, therefore, they are not against me. I have a judgment debt for costs in a final judgment in an action, and am within the section.

[THE LORD CHANCELLOR: The point seems to be, when part of the judgment as to damages is not final, can you make the order as to costs a final judgment, so as to support a bankruptcy notice?]

It is a final judgment in its strict sense. The judgment is final as to the costs, and execution could be issued on it. Nothing further could be done in the action so as to affect the amount of costs included in the judgment. The authorities quoted and relied on by the registrar are distinguishable on the ground that they were in respect of mere orders for costs. With regard to the other point, in respect of the counterclaim, it is merely concerning an alleged balance on the partnership accounts. The plaintiff did not proceed with the accounts, but the defendant did not claim that they should be taken. Moreover, such a counterclaim could have been set up in the action.

Herbert Reed for the respondent.

I submit (1) that this judgment is not, in respect of the costs, a final judgment at all; and (2) that it is not a final judgment within the section. On referring to the order made, it will be seen that it is really in two parts: the Court orders and adjudges *inter alia* an enquiry as to damages, and then it orders, without the words adjudge or decree, that costs shall be paid. The recital in the taxing master's certificate is in pursuance of the *order* of the Court. So far as it decrees a dissolution of partnership, it is a judgment. Then the Court directs an enquiry as to damages, and that is not a final judgment. When a decree which is a judgment as to part goes on to order something to be done, such order cannot be called a final judgment: this is a mere order. An order, however final, is not the same as a judgment. (*Counsel*

referred to *Cremetti v. Crom*, L. R., 4 Q. B. D. 225; *Financial Corporation v. Price*, L. R., 4 C. P. 155.) Then I say further that this is not a final judgment within the section. The beginning of the section shows that. The section says, "If a creditor has obtained a final judgment, &c." That points to the fact that the person who obtains the judgment must be a creditor.

[THE MASTER OF THE ROLLS: Your reading would take away a judgment for a tort altogether.]

THE LORD CHANCELLOR (SELBORNE):

It appears to me that the sum in question is due under a final Judgment. judgment obtained by the creditor who has served the bankruptcy notice upon the debtor. That it is a judgment is unquestionable; and it is final, because nothing more has to be done. The only question is, whether, as there is also a question of damages, which cannot be said to be final until an enquiry has been taken, any difference is made. But I am of opinion that it makes no difference if, as in this case, the amount in question is wholly independent of the result of that enquiry. I cannot accede to the argument that the words "a creditor" in the section mean a creditor before final judgment. They mean a creditor under or by means of a final judgment. There were, no doubt, one or two expressions in previous judgments which would seem to point to an antecedent liability, but they must be taken in connection with each particular case. As to the question of the counterclaim, no case whatever has been opened to show that there was any counterclaim of which advantage could not have been taken in the action, and the appeal must therefore be allowed.

THE MASTER OF THE ROLLS (BRETT):

If an order is only an order for the payment of money, however final, it is not a final judgment. But if the order for the payment of money is an indivisible part of the judgment of the Court, which is strictly final, you cannot say that it is not a final judgment. The question is, whether this order to pay costs is part of a final judgment. In my opinion, it is an indivisible part of it, and the whole is a debt due on a final judgment. As to the refined

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argument that "a creditor" in the section means a creditor before final judgment, such argument will not bear discussion. It would shut out those who were clearly intended to be benefited by the Act.

COTTON, L. J.:

I am of the same opinion. The question is, Is this a final judgment? In my opinion it is clearly so. It is the final decree at the hearing of the action subject to this, that certain enquiries shall be taken. But it is a final decree that there shall be perpetual injunction. The enquiry ordered does not in any way modify that part of the judgment which directs the injunction and directs the payment of costs. I would stop here, but it appears to me that the decision in the Court below was in some measure founded upon a remark which fell from me in the case of *In re Chinery*, *Ex parte Chinery*, that the words final judgment in the section must be construed in their strict technical sense of a judgment in an action which established a liability previously existing of a debtor to a creditor. But here there was a previous existing liability. The defendant had undertaken not to carry on business. The judgment is a judgment in an action brought to enforce a previous liability.

Appeal allowed with costs.

Solicitors: *Hamlin, Grammer & Hamlin*, for the appellant.
Rogers & Chase for the respondent.

Cases relied upon or referred to:—

Duke of Beaufort v. Phillips, 1 De G. & S. 321.

In re Chinery, Ex parte Chinery, see *ante*, Volume I., p. 31, L. R., 12 Q. B. D. 342.

In re Cohen, Ex parte Schmitz, see *ante*, Volume I., p. 55, L. R., 12 Q. B. D. 509.

In re Sanders, Ex parte Whinney, see *ante*, Volume I., p. 185, L. R., 13 Q. B. D. 436.



IN RE W. F. BULL.

BEFORE
MR. REGIS-
TRAR MURRAY.

1885.

Feb. 18.

Bankruptcy Act, 1883, Section 28.
Discharge : Objection to report of Official Receiver.

Where, on an application for discharge of a bankrupt, an objection was taken on behalf of the bankrupt to the report of the official receiver being received in evidence, on the ground that, although such report bore the signature of that official, it was not prepared by him.

Held : That such report is *prima facie* evidence of the statements contained therein, as provided by section 28, sub-section (4) of the Bankruptcy Act, 1883, and that the Court will not go behind the report or enter into any enquiry as to by whom it was prepared.

THIS was an application for an order of discharge.

The debtor, *W. F. Bull*, who formerly carried on business as a paper stock merchant in Bucknall Street, New Oxford Street, was adjudicated bankrupt in July last.

The statement of affairs showed debts amounting to 1,034*l.*, with assets 97*l.*

The assistant official receiver reported that although the bankrupt had kept books which might be sufficient for his trading, they did not really disclose his business transactions and financial position.

The application for discharge was now opposed by certain creditors, on the ground that the bankrupt had been guilty of offences under the Debtors Act, 1869, and section 28 of the Bankruptcy Act, 1883.

F. C. Willis for the bankrupt.

W. W. Aldridge, official solicitor, for the official receiver.

Blackwell for opposing creditors.

F. C. Willis:

I will say at once that I object to the report of Mr. *Wreford*, the assistant official receiver, being received in evidence. It is true

1885. the report in question bears the signature of that gentleman, but I
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W. F. BULL. understand it was not prepared by him. On going to the office of
the official receiver my clients ascertained that the report was really
made by a Mr. *Perrott*, and Mr. *Wreford* knew nothing about it.
Application was made for a subpoena to examine Mr. *Wreford*, but
it was refused.

[**MURRAY, REGISTRAR:** By sub-section (4) of section 28 of the
Bankruptcy Act, 1883, it is provided that "for the purposes of this
section the report of the official receiver shall be *prima facie* evidence
of the statements therein contained."]

I admit that, but as a matter of fact this report is not the report
of the official receiver at all. I ask your Honour to allow me to
bring evidence of that.

MURRAY, REGISTRAR:

I have not the slightest intention of going behind the report.
There is nothing to show that it is not a proper and genuine document.
If there exists any ground of complaint, the complaint
must be made to another quarter. It is sufficient for the present
purpose to say that I refuse to enter into any enquiry whether the
report was prepared by the assistant official receiver or by some
other person.

[The case then proceeded upon the merits, which are not worthy
of notice, and it was finally held that the opposition had not been
established, and the order of discharge was granted as prayed.]

February 26th :

On this day Mr. *Wreford*, the assistant official receiver, attended
the Court for the purpose of making a personal explanation.

He said "that it was due to the department to state publicly
that it was not the practice of the chief official receiver or the

assistant receivers to treat the Court with disrespect, which would be involved in their attaching their signatures to documents without being thoroughly acquainted with their contents. It was necessary that the materials and facts should be collected by clerks, but the reports were those of the receivers, and they were responsible for them. He had before him a draft of the report in this particular case, and he found that the report was altered and settled by him personally before it was fair-copied for his signature. He had special opportunities of becoming acquainted with all the facts of this case, because he had been examined before the Recorder on the prosecution of the bankrupt at the Old Bailey."

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IN RE SALAMAN, EX PARTE SALAMAN.

COURT OF APPEAL.
BEFORE
THE MASTER
OF THE ROLLS,
BAGGALLAY,
L.J.,
LINDLEY, L.J.

Bankruptcy Act, 1883, Section 28.

Discharge—Rash and hazardous Speculations—Conduct of Bankrupt before Act came into Operation.

Held: (1) That the quasi-penal provisions of section 28 of the Bankruptcy Act, 1883, with regard to the granting of a bankrupt's discharge, apply to the conduct of the bankrupt previous to the time when the Act came into operation.

(2) Where the bankrupt who was a solicitor without capital entered into heavy building speculations on borrowed money, to which speculations his insolvency was attributable.

Held: That the bankrupt had been guilty of rash and hazardous speculations, and that the order of the registrar refusing an absolute discharge was a right order.

THIS was an appeal on behalf of the debtor, *J. S. Salaman*, from an order of Mr. Registrar *Pepys*, by which the discharge of

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the bankrupt had been granted subject to the condition that he should "file annually a verified statement of his earnings and income, and after retaining 300*l.* a year for the support of himself and his family, should pay over the balance to the official receiver for the benefit of his creditors until he had paid them a dividend of 10*s.* in the pound."

The debtor, *J. S. Salaman*, was a solicitor carrying on business at 12, King Street, Cheapside, and was adjudicated a bankrupt in September last.

His statement of affairs showed debts amounting to 34,502*l.*, with assets *nil*.

The bankrupt attributed his failure almost entirely to liabilities contracted in connection with the purchase and rebuilding of certain freehold premises in Tokenhouse Yard, and his inability to let this property at the rental estimated.

The report of the official receiver, read when the application of the bankrupt for his discharge was made, stated, that the transaction appeared to be a building speculation, into which the bankrupt had entered in the year 1877 without having any capital of his own, and which he carried on with borrowed money. The official receiver submitted that this, connected with other conduct of the bankrupt, amounted to rash and hazardous speculations, as contemplated by section 28, sub-section 3 (d), of the Bankruptcy Act, 1883.

The learned registrar, in making the order now appealed from, stated that the bankrupt appeared to have been more or less in difficulties in the years 1877 and 1878, and had then borrowed the sum of 7,500*l.* from a lady named Morris. Shortly after that time he engaged in speculations on the Stock Exchange, by which he lost nearly 2,000*l.* Immediately after this he entered into a heavy building speculation, to the failure of which his insolvency was attributable. The question to be determined was, whether such speculation was rash and hazardous within the meaning of the Act. All speculations were more or less hazardous, but the legislature clearly intended to draw a distinction between such speculations as were legitimate and such as were not. In the first place, it must be remarked that the building speculation was alto-

gether foreign to the business of the bankrupt as a solicitor, and in that respect the case stood upon a different footing to that of a merchant, who might in the ordinary course of his business be induced to embark in a speculation which was beyond his means. But, further, the whole of the speculations had been carried on by the bankrupt by means of borrowed money. The bankrupt incurred no risk of his own, for he had nothing to lose, and if the speculation failed, the loss would fall upon his creditors. The discharge could only be granted subject to the bankrupt filing annually a verified statement of his earnings and income, and after retaining 300*l.* a year for the support of himself and his family, he must pay over the balance for the benefit of his creditors until he had paid them a dividend of 10*s.* in the pound.

From this order the bankrupt now appealed.

E. Cooper Willis, Q.C. (Sidney Woolf with him), for the appellant.

My contention is threefold. I say (1) that the order appealed from makes section 28 retrospective in its operation, which it is not; in other words, even assuming there has been a rash and hazardous speculation, yet it cannot be considered by the Court under section 28, if this rash and hazardous speculation took place before the passing of the Act. I say (2) that it is a question, whether in this case there is sufficient proof upon which the registrar could say there had been any rash and hazardous speculations: and I say (3) that in any event the conditions imposed are too harsh. As to the first point, section 28 of the Bankruptcy Act, 1883, provides that a bankrupt may at any time after being adjudged bankrupt apply to the Court for an order of discharge. On the hearing the Court shall take into consideration a report of the official receiver, and may either grant or refuse the discharge, or grant it subject to conditions, &c., "provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under this Act, or Part 2 of the Debtors Act, 1869, or any amendment thereof, and shall, on proof of any of the facts hereinafter mentioned, either refuse the order, or suspend the operation of the order for a specified time, or grant an order of discharge subject to

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such conditions as aforesaid." And then by sub-section (3), the facts hereinbefore referred to are:—

- "(a) That the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy.
- "(b) That the bankrupt has continued to trade after knowing himself to be insolvent.
- "(c) That the bankrupt has contracted any debt provable in the bankruptcy, without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall be on him) of being able to pay it.
- "(d) That the bankrupt has brought on his bankruptcy by rash and hazardous speculations or unjustifiable extravagance in living.
- "(e) That the bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him.
- "(f) That the bankrupt has within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to any of his creditors.
- "(g) That the bankrupt has on any previous occasion been adjudged bankrupt; or made a statutory composition or arrangement with his creditors.
- "(h) That the bankrupt has been guilty of any fraud or fraudulent breach of trust."

Between the time of the passing of the Bankruptcy Act, 1869, and up to the coming into operation of the Bankruptcy Act, 1883, the provisions of this sub-section could not be taken notice of in bankruptcy. But in the Acts of 1849 and 1861, there were analogous provisions. I would refer to section 256 of the Bankruptcy Act, 1849, and to sections 221, 158, and 159 of the Bankruptcy Act, 1861.

[THE MASTER OF THE ROLLS: How do the old Acts help us?]

They tend to show that such provisions ought not to be held retrospective.

[LINDLEY, L. J.: In the old Acts these things were an offence. This is a condition of discharge.]

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I would refer your Lordships to the case of *In re White* (33 L. J., Bank. 22; 9 L. T. 702). There it was held that sect. 159 of the Bankruptcy Act, 1861, was not retrospective, and that "an offence created by that clause must, in order to justify the refusal or suspension of the order of discharge have been committed subsequently to the passing of the Act."

[BAGGALLAY, L. J.: The principle upon which Lord WESTBURY went was that it was made a criminal offence.]

[THE MASTER OF THE ROLLS: Under two former statutes the Court of Appeal has held that the conduct of the trader before the Act came into operation might be taken into account. (*Ex parte Staner*, 2 De G. M. & G. 263; *Ex parte Dornford*, 4 De G. & S. 29.) Then look at section 28, sub-section 3 (h). Do you say that if the bankrupt had been guilty of fraud no notice could be taken of it?]

Now as to the second point I say that there were no grounds upon which the registrar could say these were rash and hazardous speculations. The bankrupt did not lend money. It was his own speculation. In the year 1876 he was solvent, and it was suggested that he should purchase with two others property in Tokenhouse Yard. A firm of architects were consulted, and they said the property was a good one, and worth more than was to be given for it. A large amount was at once borrowed on it. The two other persons who were with the bankrupt subsequently went out of the business, and in 1879 the investment company who had previously lent money to the bankrupt advanced further sums to him for the purpose of building on the land. In 1881 the buildings were completed, and were estimated to produce from 75,000*l.* to 100,000*l.* The amount of debt on them was 61,000*l.*

[THE MASTER OF THE ROLLS: The bankrupt had borrowed that.]

He was assured the property was worth 75,000*l.* If it had let well it would have been of that value. It did not let well.

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[THE MASTER OF THE ROLLS: That was the speculation. Do you mean to say that if a man who has no money at all gets an estimate that what he is going into will turn out favourably, and the transaction turns out badly, that that is not speculation. I wish the law was that if a solicitor entered into speculations of this nature he could and should be struck off the rolls immediately.]

[LINDLEY, L. J.: The man was not risking his own money, that is your difficulty.]

Now as to the third point. I submit that the terms imposed by the registrar are at any rate too harsh.

[THE MASTER OF THE ROLLS: It might be said they are too indulgent.]

Macdonell for the official receiver,
Herbert Reed for opposing creditors,
 were not called upon.

THE MASTER OF THE ROLLS (BRETT):

Judgment.

The first point which has been raised on behalf of the bankrupt in this case is one which it was very fair to argue. The second point has been argued at enormous length, and is of little value. The first point dealt with the construction of the Act of Parliament. It is said that even assuming there have been rash and hazardous speculations, yet this is not to be considered by the Court under section 28 of the Bankruptcy Act, 1883, if the rash and hazardous speculations took place before the passing of the Act. Now if we do say these must be taken into account, it does not, in my opinion, necessarily make the section retrospective. The section deals with something to happen after the statute is passed. The question before the registrar was within section 28, and he has to grant or refuse the discharge, or give a conditional discharge, and he has to do it under section 28. The section provides: (1) "A bankrupt may, at any time after being adjudged bankrupt, apply to the Court for an order of discharge, and the Court shall appoint a day for hearing the application, but the application shall not be heard until the public examination of the

bankrupt is concluded. The application shall be heard in open Court." The bankrupt has to apply. Then by sub-section (2) on the hearing of the application the Court shall consider the report of the official receiver, and may grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time or grant it subject to conditions, "provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under this Act or Part II. of The Debtors' Act, 1869, or any amendment thereof, and shall on proof of any of the facts hereinafter mentioned, either refuse the order, or suspend the operation of the order for a specified time, or grant an order of discharge subject to such conditions as aforesaid." And in sub-section (3) : "The facts hereinbefore referred to are (a) That the bankrupt has omitted to keep such books of account as are usual and proper. . . ." Is this a new offence? Would it be likely to startle a trader? Most certainly not. Then (b) "That the bankrupt has continued to trade after knowing himself to be insolvent. (c) That the bankrupt has contracted a debt without a reasonable ground of expectation of being able to pay it." All these were things which a trader knew were wrong long before the Act was passed. It is not manufacturing a new thing. They were known to be wrong long before the passing of the Act. If the case stands on the words of the section alone, there is no reason why, where a bankrupt applies for his order of discharge, the Court should not take into consideration his conduct before the commencement of the Act. I am inclined to think that the Court might do so even if the adjudication had been made before the commencement of the Act. The case of *In re White* (9 L. T., N. S. 702), has been quoted with reference to section 159 of the Bankruptcy Act, 1861. The things then were treated as crimes, and there was the proviso, "Provided always, that no person shall be liable by virtue of this Act to any criminal proceeding or penalty in respect of any matter which may have occurred before the passing of this Act to which he would not have been liable if this Act had not passed." There is no such proviso in this Act; the things are not crimes, and not treated as criminal. The case of *Ex parte Dornford* (4 De G. & S. 29) shews that the conduct of a bankrupt of a similar nature to that which is dealt with by

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section 28 could be taken into consideration, and in *Ex parte Staner* (2 De G. M. & G. 263), it was held that "misconduct as a trader before the 12 & 13 Vict. c. 106 (The Bankruptcy Act, 1849) came into operation may be properly regarded upon an application for a certificate under that Act." I say, therefore, that the decision of Lord WESTBURY in *In re White* was on a section not like this, and on a statute not like this. We do not overrule that decision, but we act on this present statute. Now can it be said that the registrar was wrong in holding that this person had been guilty of rash and hazardous speculations? It is a question of fact, and from the facts it appears that the bankrupt was a solicitor. To this business he owed all his time. What did he do? I look at his whole conduct. He had no capital. As soon as he met with a loss he had to borrow money. Now what did he do? First of all he speculates on the Stock Exchange. He loses 2,000*l.*, and only pays the loss by borrowing. He could not invest. He must have been playing for a rise and fall on the Stock Exchange. Such conduct was absolutely reckless. It was a speculation no prudent and steady man would enter into. What then? This solicitor finds land for sale. It is valued at some 75,000*l.* He plays again for the rise on the chance of finding a purchaser at an advanced price. In order to buy he has to borrow, and he has to pay interest, and he has to mortgage to pay interest. It turns out a mere building speculation. He now goes into further speculations to build, and if he cannot sell it he may perhaps let it. If he had had 70,000*l.* at his bankers I should have thought such conduct rash, but it would have been his own concern if he had entered into the transaction. But here is a man without a shilling. If he does not sell or let immediately he must be choked by the interest he has to pay. He was guilty to my mind of the most reckless rashness. It is bad practice for a solicitor to enter into any speculation which is not strictly in connection with his business as a solicitor. I say it now and I wish it was laid down as a rule that if a solicitor did so he should be struck off the rolls. I am decidedly of opinion that in this case the speculations were most rash and hazardous, and that the decision of the registrar was certainly a right one. But it is said that the conditions he imposed were too severe. I will only say that

to my mind they were too lenient, and that the discharge ought to have been absolutely refused. The appeal will be dismissed with costs.

BAGGALLAY, L. J. :

The grounds of appeal which have been put forward in this case are three in number ; (1) assuming the rash and hazardous speculations to have been established, it is said they occurred before the Act came into operation, and ought not to be taken into account ; (2) the evidence was not sufficient to establish the rash and hazardous speculations ; and (3) that in any case the punishment imposed is too severe. The order of the registrar is on section 28. The Court may grant or refuse the order of discharge, or grant it under conditions, and the facts upon which the Court may act are found in sub-section (3). Now, if we look at all the provisions from (a) to (g) of this sub-section (3), we find that they all have reference to the acts of the bankrupt with regard to misconduct as a trader. They all fall short of a misdemeanour, but are wrong conduct. Now if the appellant here is right in his contention, the Act is a dead letter as to (a)—a dead letter until three years have elapsed—and so with the several other sub-sections. So if I deal with it solely on this footing, I should be against that contention. Then it is said that the case of *Ex parte White* shows that provisions of this kind ought not to be taken into account. But *Ex parte Dornford* and *Ex parte Staner* held that they could be taken into account. There is this distinguishing circumstance in *Ex parte White*. The Act of 1861 was in force ; it was there in the nature of a criminal proceeding. Therefore, whether we construe section 28 on its terms or by authority, I am of opinion that the conduct of the debtor before the Act came into operation may be taken into account. It is not necessary for me to state the other facts. I entirely concur in what the Master of the Rolls has said. There can be no question but that the conduct of this man was rash and hazardous, and I also think the punishment was too lenient.

LINDLEY, L. J. :

I am of the same opinion. The first question of law is an important question, whether the provisions of section 28 apply to the conduct of the bankrupt before the coming into operation of the

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Act when the debtor is adjudged bankrupt after the passing of the Act. It is said that such a course gives it a retrospective effect. I cannot see that. The construction we put upon the section is to my mind clear to demonstration. Look at the alternative, and the great latitude it would give to a bankrupt. The Act under which the case of *In re White* was decided was worded in an entirely different way, and that decision is not applicable to the present Act. Under the present Act, the conduct of the bankrupt previous to the coming into operation of the Act must be taken into account. As to whether there were rash and hazardous speculations in this case, I am only surprised there was any serious argument on that point. They were rash in the extreme, and utterly unjustifiable. I, too, think that the registrar ought to have refused the order, but we will not now interfere with his decision. The appeal will be dismissed with costs.

Appeal dismissed with costs.

Macdonell:

I ask for the costs of the official receiver.

THE MASTER OF THE ROLLS:

Yes; you will have them out of the deposit.

Herbert Reed:

I appear on behalf of opposing creditors. We were served with notice of the appeal, and I ask for costs.

THE MASTER OF THE ROLLS:

Why? I want to put an end to that idea that because you have had notice you must come and are entitled to have costs. The creditors are at liberty to appear, but if they do so they must be prepared to do it at their own expense.

Solicitors: *Linklater & Co.* for the appellant.

W. W. Aldridge for the official receiver.

F. Lawrence for opposing creditors.

Cases relied upon or referred to:—

In re White, 33 L. J., Bank. 22; 19 L. T. 702.

Ex parte Staner, 2 De G. M. & G. 263.

Ex parte Dornford, 4 De G. & S. 29.

IN RE GLANVILLE, EX PARTE THE TRUSTEE.

BEFORE
MR. JUSTICE
CAVE.
1885.
March 2.

Bankruptcy Act, 1883, Section 48.

Act of Bankruptcy—Appropriation of First Proceeds of Sale of Goods—Fraudulent Preference—Costs.

A debtor, on August 28th, 1884, on being pressed by a creditor, who had obtained judgment, for payment of the debt due to him, gave to an auctioneer, who was about to sell the farming stock of such debtor, a document by which he authorized and requested him to pay to such creditor, after deducting any rent which might be due to the landlord, the debt due to him out of the first proceeds of the sale, and appropriated the sum necessary to pay the debt out of the proceeds of the sale for the purposes of the payment.

On October 22nd, 1884, a receiving order was made against the debtor, and the sum so appropriated was subsequently claimed by the official receiver as trustee in the bankruptcy on the grounds (1) That the document was an assignment of the whole of the debtor's property, and as such amounted to an act of bankruptcy; (2) That it was a fraudulent preference.

Held:—(1) That under the circumstances of the case the document in question did not amount to an assignment of the whole of the debtor's property.

(2) That the principal motive of the debtor was not to favour the creditor, and that the transaction did not constitute a fraudulent preference.

(3) That the official receiver as trustee having come to the Court was in the same position as an ordinary litigant, and being unsuccessful must pay the costs. (*Ex parte Angerstein, In re Angerstein, L. R., 9 Ch. App. 479.*)

THIS was an application on behalf of the official receiver for the district of Cornwall, as trustee in the bankruptcy of the debtor, *T. Glanville*, for an order declaring that the sum of 142*l.* 11*s.* 6*d.* formerly in the hands of an auctioneer named *Hawker*, but now paid into Court, was part of the estate of the bankrupt, and ought to be paid to the official receiver as such trustee.

The bankrupt, *Glanville*, who formerly carried on business as a farmer near Truro, had certain dealings with one *Harris*, to whom he owed money, and on February 22nd, 1884, *Harris* recovered judgment against the debtor for 130*l.* 12*s.* 9*d.* on a promissory note. Further transactions subsequently took place between the parties which increased this debt to 160*l.*

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The debtor had at this time, also, other creditors to the amount of about 180*l.* Having given due notice to leave his farm, the debtor, in July, instructed *Hawker*, as auctioneer, to prepare for the sale of his farming stock at the following Michaelmas.

Harris thereupon pressed for payment of the debt due to him, and, on August 28th, the debtor gave a document to *Hawker*, the auctioneer, by which he authorised and requested him to pay to *Harris*, after deducting any rent which might be due to the landlord, the sum of 160*l.* out of the first proceeds of the sale, and appropriated the sum of 160*l.* out of the proceeds of the sale, for the purposes of the payment.

On September 24th the sale was held, and the goods realised 276*l.* 12*s.* 8*d.*, of which a certain sum was paid out for rent, and after deducting other expenses, a balance remained of 142*l.* 11*s.* 6*d.*

This balance was not paid immediately to *Harris* however, and a receiving order having been made against the debtor on October 22nd, it was now claimed by the official receiver as trustee in the bankruptcy, on the grounds (1) that the document in question was an assignment of the whole of the debtor's property, and (2) that it was a fraudulent preference.

Muir Mackensie for the trustee.

Lane for Mr. *Harris*.

Muir Mackensie:

I submit that this document was (1) an assignment of the whole of the debtor's property, and as such was an act of bankruptcy; and (2) it at any rate amounts to a fraudulent preference. I purpose to examine the bankrupt who is present in Court. (*The bankrupt, T. Glanville, was examined and said*, "At Michaelmas, 1883, I gave notice to quit the farm at Michaelmas, 1884. · Harris suggested that I should sign a paper for the auctioneer to pay him the money due. The document was signed by me at the office of Harris's solicitor. The sale took place in September, and consisted of the cattle and implements, and live and dead stock. Besides the things sold, other things on the farm were valued. These other things consisted of barley, oats, hay, mangolds, and grass seeds. They could not be sold by reason of restrictions in the lease. The

incoming tenant took them and paid 99*l.* 15*s.* for them. *On cross-examination:* Harris threatened to put in an execution at once if I did not sign the memorandum. There was a field of wheat and barley, besides that taken into account in the 99*l.* 15*s.*—which were not taken by the landlord or the tenant. I thrashed the wheat. It came to about 35*l.* The barley was worth about 10*l.* There was also six Cornish bushels of oats worth 2*l.*") On the evidence I submit that the question comes within a case where a man puts the whole of his property without the reach of his creditors: that is an act of bankruptcy, and the property belongs to the trustee.

[CAVE, J.: This is not an assignment of more than was actually due to the creditor.]

Your Lordship has to look at what was appropriated.

[CAVE, J.: How does this vest the property? It merely is an authority to *Hawker* to pay money he may receive. If he received nothing he was to pay nothing. You will have to satisfy me that any other creditor would be prevented from issuing execution on these goods before they were sold. There was nothing to prevent anybody else seizing them. Does this amount to an assignment of the goods before they came into *Hawker's* hands, or is it only an order as to the proceeds?]

In *Ex parte Helder*, *In re Lewis* (L. R., 24 Ch. Div. 339), it was held that where a bankrupt placed the whole of his property in the hands of an agent to sell it, and directed the agent to pay the whole of the proceeds to some favoured creditors, an act of bankruptcy was committed, on the principle that the whole of the property was put out of the reach of the general body of the creditors. Also, in the case of *Ex parte Hall*, *In re Whitting* (L. R., 10 Ch. Div. 615; 48 L. J., Bank. 79; 40 L. T. 179), "a customer, in July, borrowed 200*l.* from his bankers, upon the terms of a verbal agreement that the loan should be repaid out of the rent of a farm which would become due to him at Michaelmas. The money was advanced by the bankers, and the customer then gave them a letter addressed by him to the tenant of the farm, by which he authorised and requested the tenant, when his Michaelmas rent became due, to pay 200*l.* to the bankers. The letter contained no refer-

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1885. ence to the loan, and did not show that any consideration had been given for the authority. The bankers sent the letter to the tenant. The customer was adjudicated a bankrupt upon an act of bankruptcy committed in August. *Held*, that as the rent was an interest in land, the agreement was one which, by virtue of section 4 of the Statute of Frauds, could not be proved by parol evidence, and that therefore the letter could alone be looked at. *And held*, that the letter amounted only to a revocable authority to pay the rent to the bankers, and that it was revoked by the bankruptcy." Then I say further, that upon the facts this case comes within the doctrine of fraudulent preference. True there was a so-called pressure, but in reality it was no pressure. The arrangement was that the debtor should prefer this creditor. Pressure to be effective must be that under which the debtor has something to fear.

[CAVE, J.: There was a threat to seize in February and again in August.]

In *Ex parte Hall, In re Cooper* (L. R., 19 Ch. Div. 580 ; 51 L. J., Ch. 556; 46 L. T. 549): "On February 17th a trader told one of his creditors that he was about to stop payment. The creditor then pressed for security for his debt, and threatened to commence proceedings against the debtor at once if he did not fulfil a verbal promise which he had on January 17th, when the debt was contracted, made, to supply the creditor with goods or their equivalent as security. The creditor had, on February 14th, before he knew that the debtor was about to stop payment, pressed the debtor for the promised security, and the debtor had then again promised to give it. On February 19th the debtor delivered two bills of exchange, accepted by some other firms, to a third person, telling him to hand them to the creditor. On February 24th the debtor filed a liquidation petition, and on March 10th he was adjudicated a bankrupt. *Held*, that the delivery of the bills of exchange amounted to a fraudulent preference of the creditor, and that it was void as against the trustee in the bankruptcy. Per *Jessel, M. R.*: Inasmuch as the threat to bring an action could have no influence on a man who was just about to become bankrupt, there was no real pressure exerted by the creditor on February 17th, and the

prior pressure on February 14th having been ineffectual, could not be taken into account."

Lane for Mr. Harris :

If the debtor had acted in the collusive idea of favouring *Harris*, then it would be without doubt a fraudulent preference. Here the debtor admits that he believed he was solvent in February : he had given notice to leave his farm : believing he was solvent, he set himself to secure the opportunity of working out the sale which would be held, as favourably as possible. To stave off any pressure he gave the promissory note, but *Harris* was not satisfied, and threatened execution, and under that threat the debtor gave the document in question. The pressure was perfectly *bond fide*, and the intention of the debtor was to realise the estate to the best advantage, and not to prefer the creditor. As to the other point, this can be tortured into nothing more than an order on the auctioneer to pay out of the proceeds. Any creditor could have seized the goods before the sale. On August 28th the debtor had property worth altogether something like 430*l.* This charge was given, not on the whole property, but on the live and dead stock, and was not even an assignment of the whole of that, but only of as much as might be necessary.

Muir Mackenzie in reply.

CAVE, J.:

I must admit that I have had great difficulty in following the Judgment. argument which has been put forward on behalf of the trustee that this is an act of bankruptcy. The facts of the case are clear. The debtor owed 160*l.* to Mr. Harris : he owed about 180*l.* to other creditors, and a certain sum for rent, making, it would seem, in all about 490*l.* owed by him. He had assets to the extent of some 430*l.* as matters turned out. The precise amount he could not then tell, because the goods had to be sold. He had given notice to leave his farm at a time when he believed he was solvent. He put into the hands of the auctioneer goods to the extent of 276*l.*, leaving other property in his possession amounting to 160*l.* With regard to the goods in the hands of the auctioneer, he gave the instructions that the landlord was to have one quarter's rent

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amounting to 73*l.*, and then Harris's debt was to be paid to him. Now, when the rent alone was paid, it left more than sufficient to pay Harris. It left a sum of 203*l.* And because a man has goods to the value of 430*l.*, and puts 276*l.* worth of them into the hands of an auctioneer, and gives this direction to pay to Harris, I am asked to hold there is a *cessio bonorum*. I cannot hold any such thing. The case of *Ex parte Helder* which has been quoted is altogether different. Then, as to the question of fraudulent preference. If the principal motive of the debtor in this document was to favour the creditor, it would be sufficient to constitute it a fraudulent preference. But I cannot come to that conclusion. In my opinion, it was not the main object. The debtor had given notice in 1883, when he was apparently solvent. In February, he says he believed he was solvent; the events show he became subsequently insolvent, but looking to the fact that he was an agriculturist, and that agriculture depends much on the season, there seems no ground to suppose that the debtor did not really suppose himself to be solvent. He gave at that time a promissory note: the creditor was not satisfied, and consequently brought an action, judgment went by default, and such creditor could issue execution. Now what is done? The creditor proposes to leave his money until the stock is sold off, and during that time any other person could obtain judgment and issue execution. In July some steps became necessary with regard to the realisation of the live and dead farming stock when the tenancy should come to an end. The tenant must remain in possession of them until Michaelmas, because he had to keep up the cultivation of the farm. An arrangement was thereupon made that the debtor should give his creditor *Harris* an authority to the auctioneer to pay him his debt out of the proceeds of the sale. That pressure was put upon the debtor to sign this document is proved from the debtor's own mouth. Yet it is said that this document of August 28th was wholly in the interest of the creditor, and not in the interest of the debtor. I confess I am unable to see that. It must have been of great importance to the debtor to defer the seizure of his goods under an execution until Michaelmas, and so realise the most he could get from the incoming tenant, and from the sale of those crops which the incoming tenant was not going to take. He was enabled to do this;

he was enabled to dispose of the tenant right for about 100*l.*, and he got nearly 50*l.* for the other crops. There is certainly good grounds for supposing that he did obtain a substantial benefit. I think, perhaps, the debtor might even have been justified in supposing he could pay off all his creditors. His debts, roughly speaking, were 500*l.*; the property actually realised about 440*l.*; it might, in the event of a favourable sale, have realised the whole amount. I am unable to see any fraudulent preference; I cannot see that any act of bankruptcy was committed, and in my opinion the creditor is entitled to the money which has been paid into Conrt.

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Application refused.

Lane :

I ask for costs. Such costs to be against the trustee personally. The case of *Ex parte Angerstein, In re Angerstein* (L. R., 9 Ch. App. 479; 30 L. T. 446), shows that a trustee in bankruptcy who brings or defends an action will, as between the litigating parties, be in the same position as to costs as any other litigant. In this case the facts were clearly before the official receiver as trustee in the affidavits. He had the bankrupt before him, and could examine anyone he pleased upon oath. He chose to press the case on, and come to this Court with his eyes open, and ought to pay the costs personally. There is no estate.

Cave, J.:

Yes, I think it must be with costs. The order will be that the money be paid out to the creditor, and the costs of the creditor to be paid by the official receiver as trustee.

Solicitors: *The Solicitor to the Board of Trade* for the official receiver as trustee.

Emmet, Son & Stubbs, for Mr. Harris, the creditor.

Cases relied upon or referred to:—

Ex parte Helder, In re Lewis, L. R., 24 Ch. Div. 339.

Ex parte Hall, In re Whitting, L. R., 10 Ch. Div. 615; 48 L. J., Bank. 79; 40 L. T. 179.

1885. *Ex parte Hall, In re Cooper*, L. R., 19 Ch. Div. 580; 51 L. J.,
 IN RE Ch. 556; 46 L. T. 549.
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 30 L. T. 446.
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PRACTICE.

BEFORE
 MR. JUSTICE
 CAVE.
 1885.

March 3.

IN RE A. MOORE.

Bankruptcy Act, 1883, Section 104.

Where, on the refusal of an application by the registrar, application was subsequently made to the Judge sitting in bankruptcy to review the decision,

Held: That there was no power to accede to the request, and that in the event of the registrar declining to review his own decision, the proper course was by way of appeal to the Court of Appeal.

THIS was an application *ex parte* on behalf of the Bank of New Zealand to stay the proceedings under a bankruptcy petition presented against the debtor, *A. Moore*.

The debtor carried on business in England and New Zealand, and was adjudicated bankrupt in the latter country on January 27th, and a bankruptcy petition was subsequently presented against him in England.

A large part of the books were in New Zealand, and the Bank of New Zealand, who were stated to be creditors to the amount of 16,000*l.*, now made application to stay the proceedings in England on the ground that they had no means in this country of proving their debt.

The first meeting was appointed to be held this day (March 3rd), and for that reason the application was made.

It appeared that application had been made on the previous day (March 2nd), to Mr. Registrar *Murray*, by whom it was refused.

Lathom for the Bank of New Zealand:

The case is an urgent one. Mr. Registrar *Murray* refused to interfere yesterday, and for that reason I come to your Lordship.

[CAVE, J.: If application has been made to Mr. Registrar Murray you are making me sit as a Court of Appeal from him. That cannot be.]

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The Court may review its order.

CAVE, J.:

You cannot come to different parts of the Court for that purpose. Mr. Registrar Murray may review his order of yesterday. But if he will not do so your only course is to go to the Court of Appeal.



IN RE WALLIS, EX PARTE THE TRUSTEE.

Bankruptcy Act, 1883, Section 44, sub-section (iii.).

Order and Disposition—Trade or Business—Sale of Surplus Produce of Farm and Garden for Profit—Bill of Sale.

BEFORE
Mr. JUSTICE
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In a case where the bankrupt took a house with 79 acres of land, at a rent of 400*l.* a year, and subsequently rented other land to the extent of 100 acres (part of which he sublet), and farmed the land so taken for pleasure, and out of the returns supplied his house, and sold the surplus farm and garden produce, and also bred horses,

Held: That the house and land were taken for pleasure and enjoyment, and not for the purpose of business; that this intention was never changed into such a purpose as that of holding them for business only; and that the bankrupt had not carried on business as a farmer or market gardener so as to entitle the trustee in the bankruptcy to claim certain goods against a bill of sale holder, as being in the order and disposition of the bankrupt in his trade or business under section 44, sub-section (iii.) of the Bankruptcy Act, 1883.

THIS was an application on behalf of the trustee in the bankruptcy of *Charles Woodward Wallis*, for a declaration that the sum of 127*l.*, being the proceeds of a sale by auction of certain live stock, plants, implements and other property, at Ankerwyke House, the residence of the bankrupt, should belong to the trustee, and after deducting the costs of the auctioneer and other expenses should be paid over to him.

The question was whether these goods which had been sold were

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 THE TRUSTEE. "at the commencement of the bankruptcy in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner," within the meaning of section 44, sub-section (iii.) of the Bankruptcy Act, 1883.

The bankrupt, *C. W. Wallis*, who was described as of New Square, Lincoln's Inn, and of Austin Friars, barrister-at-law and promoter of public companies, became tenant in January, 1880, of Ankerwyke House, Wraysbury, with 79 acres of land, at a rental of 400*l.* a-year. At the following Michaelmas he took another 100 acres, but sublet 40 acres of these.

The bankrupt fell into difficulties, and in November, 1883, he executed a bill of sale of the property now in dispute to Messrs. *Robinson & Fisher*. The goods, however, remained in the possession of Mr. *Wallis*, and he continued to use them, and on December 21st, 1883, Mrs. *Wallis*, the wife of the bankrupt, purchased from Messrs. *Robinson & Fisher* the whole of the property comprised in the bill of sale.

On January 21st, 1884, another bill of sale was executed, to which Mrs. *Wallis*, her husband, and one *P. C. Sayers* were parties, by which it was agreed, that whereas the mortgagor was absolutely entitled in her own right to certain chattels, &c., the mortgagor assigned the chattels and implements mentioned in the schedule to the said *P. C. Sayers*. These chattels and implements, which comprised the goods in dispute, remained in the possession of the bankrupt, and continued to be used by him.

On April 12th, 1884, the bankrupt failed to comply with the terms of a bankruptcy notice, and on July 10th a receiving order was made against him.

On July 23rd, *P. C. Sayers* took possession of the property comprised in the bill of sale. On July 31st *Wallis* was adjudicated bankrupt; and a Mr. *Sully* was subsequently appointed trustee.

On August 20th, *Sayers* advertised the property to be sold; but on the application of the bankrupt and the trustee the sale was restrained by Mr. Justice CHITRY until October 9th, on which day it was allowed to take place, only on an undertaking being given that the proceeds should be retained by Mr. *Lee*, the solicitor of *P. C. Sayers*, until the matter had been decided by the Court.

The trustee now applied for a declaration that, as against *P. C.*

Sayers, the holder of the bill of sale, he was entitled to these proceeds.

Winslow, Q.C. (Herbert Reed with him), for the trustee:

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The question is one of "order or disposition." The bankrupt carried on business as a farmer and as a market gardener. He tried to make as much profit as he could. He used to breed and buy and sell horses, and he employed the glass houses for raising fruit, which he sold. In the analogous section of the Act of 1869 the chattels were chattels to be used by a man in his trade. The rule as to order and disposition only applied to a trader. In section 15, sub-section (5), of the Bankruptcy Act, 1869, it was provided that property divisible amongst a bankrupt's creditors shall comprise "all goods and chattels being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner; provided that things in action, other than debts due to him in the course of his trade or business shall not be deemed goods and chattels within the meaning of this clause." That applied only to the case of traders. But now by section 44, sub-section (iii.), of the new Act of 1883, the property shall comprise "all goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section." Now the distinction is chattels in a man's "trade or business." Many persons have a business who may not be considered to have a trade. Farming is a business, and if a man gets a portion of his living by farming that is a business. Although a farmer was not a trader under the old bankrupt law, I submit that now farming is a "business." Mr. Wallis carried on business as a farmer; he carried on business as a market gardener, and that was a trader under the old act; he also dealt in cattle. Now as to the question whether these goods

1885. were in the order or disposition of the bankrupt by the consent of the true owner at the date of the act of bankruptcy. They remained at Ankerwyke, and the bankrupt continued to use them in his trade and business on the farm. [*Counsel here read several affidavits in support of the application.*] The fact that *Wallis* has carried on some sort of business and has used these chattels on his farm is not disputed. He was the lessee of these premises, and carried on some business for profit, and had a bailiff. The things were left up to the day when the act of bankruptcy was committed. If your Lordship holds that the bankrupt was not a market gardener, you will have to say whether this section is an extension to any trade or business whatever. A man who raises things for the purpose of sending them to market for sale is carrying on a business.

[CAVE, J.: Do you suggest that this man took the house at a rental of 400*l.*, for the purpose of making a profit? This was not a place surely which would be let to a market gardener. Do you say that a landed proprietor who told his gamekeeper to sell every rabbit would become a trader?]

No; there is a great deal of difference between the owner of the soil and a lessee.

[CAVE, J.: What evidence is there that *Sayers* knew the bankrupt was carrying on a trade or business if he was doing so? The things must be in the order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner.]

There is no denial in the evidence of *Sayers* of the facts stated on behalf of the trustee. I submit that there is ample evidence for the trustee to show that the goods fall within the section.

Herbert Reed followed:

In section 44, sub-section (iii.), there is a distinction drawn between "business" and "trade." The word "trade" had obtained a technical meaning. A school is not a trade. It is a business (*Doe v. Keeling*, 1 M. & S. 95). If an occupation is carried on by a person habitually and for the sake of profit, it is a business. *In re Newall, Ex parte Newall* (3 Dea. 333), it was held that "a farmer who is in the habit of buying half as many more

sheep as are necessary to stock his farm, and of selling the surplus at a profit, is a trader as a sheep-salesman."

As to the other question, whether *Sayers* had notice. Notice to *Mr. Lee*, the solicitor of *Sayers*, was notice to *Sayers*.

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Warmington, Q.C. (T. Ribton with him), for Mr. Sayers.

An application like this has always been regarded as an attempt to take one man's goods to pay another man's debts.

March 5th:

T. Ribton:

When the case was before Mr. Justice CHITTY, the validity of the trustee's claim was not discussed. We submitted to the injunction, and the claim of the trustee was not entered into. I now rely upon several points. I say (1) that the property was the separate estate of the wife, or was in the joint occupation of the husband and wife, or at any rate if it was in the sole occupation of the husband, then it was in such a manner that he was a trustee for the wife.

[CAVE, J.: There is no evidence of joint occupation.]

Then I say (2) that there is not the slightest evidence that Mr. Wallis was carrying on a trade or business. He never was a farmer in the ordinary acceptation of the term. Such buying and selling of cattle as he practised was only in the manner very common amongst all country gentlemen. But (3) even admitting that he was a farmer—he was only a farmer, and the case of *Patten v. Gould* (7 Taunt. 408) shows that where "a farmer bought rye grass seed, mixed it with seed of his own growth, and sold the mixture; and bought pigs, put them on his farm, fed them on the stubbles and resold them, some after a week, some after longer periods;" neither of them were held to be an act of trading. Further, there arises the question, (4) was there any consent and permission on the part of the bill of sale holder? It is questionable whether, in a case of this kind, the doctrine of constructive notice can be admitted at all. I submit that it cannot.

[CAVE, J.: You may take it that it was necessary for the bill of sale holder either to be aware of the facts or to shut his eyes to them wilfully.]

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Winslow, Q.C., in reply.

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Judgment.

CAVE, J.:

In this case the trustee claims certain goods as 'being in the possession of the bankrupt in his trade or business, with the consent and permission of the true owner.'

The first question that has been raised is whether the bankrupt carried on a trade or business. The trades or businesses which it is suggested he carried on were those of a market gardener and of a farmer. It is important to see what is the nature of his tenancy, and the circumstances under which he became tenant. Mr. *Wallis* appears to be a gentleman of a somewhat speculative turn of mind, devoting his energies to a great many different callings. He is said to be a barrister and a contractor, as well as farmer and market gardener. In January, 1880, he took Ankerwyke House, and 79 acres of land, at a rent of 400*l.* a year; and it is obvious from the description of the house and of the land given in the catalogue and by Mr. *Lee*, that it is an ordinary country house having a certain quantity of land attached to it, and not the kind of place which a market gardener or farmer would have dreamt of taking for the purpose of his business. No one has ever ventured to suggest that any market gardener had ever taken this place as a market garden, or that any farmer would ever dream of taking a house of this character with 79 acres of ground at a rental of 400*l.* a year, with a view of getting his living by farming.

Mr. *Wallis* appears to have had a fancy for breeding horses, cattle and pigs, and in order to pursue that avocation he thought it desirable, apparently, to have a further quantity of land; and at Michaelmas, 1880, he took another 100 acres of land at a rent of 150*l.* per annum. It is suggested that whatever may be the case in reference to the 79 acres, the taking of this further quantity of 100 acres shows that he was intending to carry on the business of a farmer; but, if that was the intention with which he took this land, it certainly is remarkable that, having a comparatively small quantity of land—179 acres, a smallish farm—he should at once have proceeded to sublet 40 acres of it, and have retained only 139 acres in his hand at a rental of 500*l.* a-year. Therefore, the circumstances under which the house and land were taken are about as

far as possible removed from the notion of any intention of carrying on any trade or business at a profit.

What is done subsequently to that? It may be, of course, that a man who takes a large country mansion with a quantity of land attached to it, for the purpose of pleasure, and who proceeds to take still more land also for the purpose of pleasure, may nevertheless change his mind, and turn his attention to business pursuits, although, of course, one would not expect anything of the kind to be done. Therefore we have to see what did take place. What were on the farm in the way of live stock were some horses, some of which appear to have been used for working the farm, and some apparently for the purpose of breeding, or both combined. There were some cows, and these appear to have been there for the purposes of the house. A house of that kind naturally requires a considerable quantity of dairy produce; and during the whole time the dairy produce has been used chiefly in the house, and the surplus only has been sold.

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Now it has been contended that a man who has a quantity of cows and horses and a large garden, and who simply sells the produce is not carrying on the business of a market gardener, and is not carrying on the business of a farmer; and that has been so strongly felt by those who advised the trustee that they have abandoned the claim to the cows; and the question of whether the cows were in his possession in his trade or business is not now in dispute.

Well, then, what else is there? It is necessary, of course, if cows are kept, that a certain amount of land should be kept also for their accommodation. I do not suppose that there are many people, at all events, in existence who keep cows and buy the whole of the stuff on which the cows are to be fed. So again, if horses are kept for the purposes of breeding; and we are told that foals were bred and sold. There, again, a quantity of land must be retained for the purpose of feeding them.

I am quite unable to say that there ever was a time when the primary intention of holding this house and land for the purposes of pleasure was ever changed into an intention of holding it for the purposes of business. Mr. Wallis appears to have got into difficulties, which is not at all unlikely when a man has too many

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things on his hands ; and he having got into difficulties, what was regarded as the surplus and disposed of in the market in order to produce some ready money gradually became more and more, and no doubt the purpose of getting money began little by little to get the upper hand ; but I do not think that there was any time at which I can say distinctly that the primary intention—the intention with which he set out of taking this house and land for the purpose of pleasure and enjoyment—was ever distinctly changed into such a purpose as that of holding it yearly for business only, so that I can say that these goods were in the possession of the bankrupt in his trade or business.

Now, if I come to look at the articles which are claimed, I find that there are a few horses. Three horses, apparently, and three ponies were claimed. Ponies are not usually a kind of stock which are bought by a farmer for the purpose of his business ; and that certainly does not look very much like carrying on a business. It looks more like the notion of enjoyment. As to the pigs there is one boar and one sow. That is the total quantity of the pigs. Now that, again, does not look like keeping pigs for the purpose of profit. I suppose that there are very few houses of this character in which such things are not kept ; and whether a man should buy his pigs, or whether he should breed them, depends very much upon his own taste in the matter.

Then come a quantity of outdoor effects, and it is very difficult to distinguish between what are used purely for the purposes of pleasure and what are used for the purposes of the farm ; but I conceive that the whole of them were used for the purposes of pleasure in the first instance ; and as I have said, I do not find any period when I can distinctly hold that that purpose of pleasure was changed into a purpose of business.

Then if I come to the market garden, in regard to which there has been most stress, on the ground that the flowers were for sale, and that no flowers were allowed to Mrs. Wallis, and that she had to buy them back from the person to whom they were sold, when I come to look at the list of the green-house and hot-house plants, and of the stove plants, and so on, I find nothing at all except what one would ordinarily expect to find in a house which was in a situation like this, and let at a rental of 400/. a year. There is,

apparently, exactly, as nearly as may be, that amount of conservatory and glass which one would expect that a person who could afford to pay 400*l.* for a house and seventy-nine acres of land would expect to have for the purposes of pleasure, and the fact that under temporary pecuniary difficulties he determined to sell the flowers instead of allowing Mrs. *Wallis* to put them in her drawing-room, cannot in my opinion amount to the carrying on of a business, and therefore I am of opinion that the whole foundation of the claim fails.

It is not necessary to go any further, as I am clearly of opinion that the bankrupt was not carrying on any trade or business upon these premises, and consequently the application must be refused with costs.

Application refused.

Solicitors: *S. H. Behrend* for the trustee.

E. Lee for Mr. Sayers.

CASES relied upon and referred to:—

Doe v. Keeling, 1 M. & S. 95.

Rose v. Miller, L. R. 27 Ch. Div. 71.

In re Newall, Ex parte Newall, 3 Dea. 333.

Patten v. Gould, 7 Taunt. 408.

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IN RE OWEN, EX PARTE PEYTON.

DIVISIONAL

COURT.

BEFORE

CAVE, J.

and

WILLS, J.

1885.

MARCH 4.

Jurisdiction—Strangers to Bankruptcy—Agreement for Costs—Attorney and Solicitors Act, 1870.

Where an agreement entered into by a solicitor to conduct certain bankruptcy proceedings on the terms that his costs should not exceed 10*l.* had been declared void by the County Court Judge on the application of such solicitor, and an appeal from this decision having been brought to the Divisional Court in Bankruptcy, the preliminary objection was taken that the Court, sitting as a Court of Appeal in bankruptcy matters only, had no jurisdiction to deal with the question at all.

Held:—(1) That the Court had jurisdiction to hear the appeal.
(2) That the fact that the agreement did not contain a provision that

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the solicitor so employed might continue the bankruptcy proceedings to the end, did not make such agreement unfair or unreasonable, and that the order of the County Court Judge setting aside such agreement must be reversed.

THIS was an appeal from an order of the learned Judge of the County Court at Canterbury, setting aside an agreement as to the costs of a solicitor entered into under the following circumstances.

Edward & Frank Peyton, who traded together as partners, were in the possession of acceptances of two debtors, of whom the bankrupt *Owen* was one, and employed a solicitor named *Hodgson* to recover judgment thereon, which was done.

In December, 1883, *Edward Peyton*, who carried on other business transactions on his own account separate from those connected with the firm of *E. & F. Peyton*, filed his petition for liquidation, and the partnership between *Edward & Frank Peyton* was subsequently dissolved.

In January, 1884, *Hodgson*, the solicitor, wrote to the private solicitor of *F. Peyton*, advising that *Owen* should be at once made bankrupt, and in that letter he offered himself to conduct the bankruptcy proceedings on the terms:—"Costs to be only out of pocket expenses and not to exceed 10*l.*"

This offer was accepted, and the bankruptcy proceedings were accordingly commenced by *Hodgson*; but in March, 1884, other solicitors were consulted by *F. Peyton*, who took the matter out of his hands.

A bill of costs amounting to 97*l.*, the greater part of which was on account of the bankruptcy proceedings against *Owen*, was thereupon sent in by *Hodgson*.

The matter had already occupied the attention of Mr. Justice FIELD in another form; but notwithstanding this, an application was made by *Hodgson* to the Judge of the County Court, sitting in the bankruptcy of *Owen*, from whom an order was obtained setting aside the agreement on the ground that it was unreasonable, inasmuch as it did not contain a clause providing that the solicitor should be entitled to pursue the proceedings to the end.

From this decision *Frank Peyton* now appealed.

R. T. Reid, Q.C. (J. S. Moore with him), for the appellant.

Powell for the respondent :

I wish to take a preliminary objection. The application to the County Court Judge was an application under the Attorney and Solicitors Act, 1870. As a matter of fact, the case has no connection with the bankruptcy of *Owen*.

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[CAVE, J.: This is an appeal from the County Court Judge in the exercise of his bankruptcy jurisdiction, for unless the Court had possessed bankruptcy jurisdiction you could not have gone there.]

It is not a bankruptcy matter at all. It is a question between third parties. The Bankruptcy Appeals (County Courts) Act, 1884, confines the right of appeal to bankruptcy matters. The right of appeal is of no greater extent now than under the Bankruptcy Act of 1869, and under that Act there are numerous cases as to the limit of the right of appeal.

CAVE, J.: We are of opinion that your preliminary objection is of no value.

WILLS, J.: I will only add that to my mind it is always a most unsatisfactory method of interpreting a new Act of Parliament to attempt to apply to it decisions upon the different language of an Act which has been repealed.

R. T. Reid, Q.C.:

The agreement was a perfectly reasonable one and was an agreement in writing. *Hodgson* suffered no damage by being prevented from pursuing the proceedings to the end. After *Edward Peyton* became bankrupt, *Frank Peyton* who remained solvent was alone interested in the proceedings against *Owen*.

Powell:

The whole circumstances under which the change of solicitors took place ought to be examined. *Hodgson* was very friendly with *Edward Peyton*, and knew that the successful conduct of the bankruptcy proceedings was a matter of vital importance to him. It was this friendship for *Edward Peyton* which led him to make the offer he did. Moreover, *Hodgson* may have had in view the

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chance of obtaining a larger sum than this out of the estate of the bankrupt.

[CAVE, J.: That can hardly have been the case. The agreement is and must be in writing, and the moment you go beyond it you are outside the operation of the Act.]

Such an agreement as this would surely be unreasonable if the person who entered into it expected in any event to get no more than his out of pocket expenses.

CAVE, J.:

Judgment.

I am of opinion that this agreement is on the whole of a fair and reasonable character. The present application is of a somewhat peculiar nature in that it is made by the solicitor. The person who offered the terms comes to the Court and asks that those terms which he has himself offered, and which have been accepted, may be declared not to be binding. The reason he assigns is that they are not fair and reasonable. The agreement in question is contained in a letter which begins with words to this effect: "The more I think of it the more I am convinced that it will be best to make *Owen* a bankrupt at once," and then the letter proceeds, "I shall be happy to do all that is necessary without putting Mr. *Peyton* to an expense of more than 10*l.*" It has already been held by my brother FIELD that there is no condition that *Hodgson* shall be retained to the end. We are now asked to read in another condition which in effect will say that *Peyton* is to pay the costs unless *Hodgson* is so retained. But the terms of the agreement in writing, to which we are confined, are distinctly that *Peyton* is to be put to no expense beyond 10*l.* It follows, therefore, that *Hodgson* could not have obtained more either out of *Peyton* or out of the estate. This is a rule of law which in my opinion is a good and wise one. If it were otherwise there would be nothing to prevent solicitors from undertaking proceedings of this kind simply in their own interest. As a matter of fact, therefore, *Hodgson* was deprived of nothing except the power of incurring more costs out of pocket. The agreement is a written one, clear and intelligible in its terms, and we cannot go beyond it. The appeal must be allowed.

WILLS, J.:

I am of the same opinion. Mr. *Hodgson* is doubtless perfectly honest in his account of his motive, and the motive itself was no doubt honourable. But the terms of the agreement are perfectly clear, and it is quite unnecessary to go beyond the written document in order to obtain an explanation of its contents. We are always anxious that we may not do injustice to any man, but if we look in this case to see what damage *Hodgson* can have suffered from losing the control of the bankruptcy proceedings, we find it is impossible that he can have suffered any. The agreement was that he should receive 10*l.*; and it is clear, upon the interpretation of the Attorney and Solicitors' Act, 1870, that he could not recover from the estate more than the sum upon which he had agreed with *Peyton*. Then with regard to the question whether the agreement is in itself fair and reasonable. Let me consider for a moment the position of the parties. I must admit that in my opinion it would be difficult under any circumstances to say that an agreement was unfair and unreasonable when both the parties entering into it were of full age and of sound understanding. But in this case the person who seeks to have the agreement set aside is the person who himself proposed the terms; he is not in an inferior position; and there is no fiduciary relationship between him and the other party to the agreement. I am of opinion, therefore, that the appeal must be allowed.

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Appeal allowed with costs here and below.

Solicitors : *Blewitt & Tyler* for the appellant.
Hodgson for the respondent.



DIVISIONAL
COURT.
BEFORE
CAVE, J.
and
WILLIS, J.
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March 4.

IN RE DALE, EX PARTE DALE.

*Bankruptcy Act, 1883, Sections 121 and 104—Bankruptcy Rules, 1883,
Rule 199.*

Small Bankruptcy—Leave to appeal not obtained.

Upon an appeal from a county court in the case of a small bankruptcy under section 121 of the Bankruptcy Act, 1883, it was argued, against the preliminary objection taken that the necessary leave to appeal had not been obtained, that Rule 199, sub-section (5), of the Bankruptcy Rules, 1883, by which such leave is made requisite, was *ultra vires*.

Held: That the right of appeal given by the Act was a statutory right; that the same statute which gave the right could delegate to a prescribed authority the power to modify the right in the prescribed manner; and that the necessary leave not having been obtained, the appeal could not be heard.

THIS was an appeal against a decision of the learned Judge of the Leicester County Court, ordering the appellant, Mrs. Dale, the wife of the bankrupt, to pay to the official receiver and trustee in the bankruptcy the sum of 242*l.*, moneys of the bankrupt in her possession.

The bankruptcy was a small bankruptcy under section 121 of the Bankruptcy Act, 1883.

F. C. Willis for the appellant.

Muir Mackensie, in support of the order:

I have a preliminary objection. I submit that the appeal cannot be heard. This is a small bankruptcy under section 121. For these small bankruptcies special procedure is provided by Rule 199 of the Bankruptcy Rules, 1883. By sub-section (5) of Rule 199, it is provided that "No appeal shall lie from any order of the Court, except by leave of the Court." In this case, leave has not been obtained, and the appeal cannot, therefore, be heard.

F. C. Willis:

I submit that Rule 199 is *ultra vires*. By section 104 of the Act, an unconditional right of appeal is given, which, in the case of the County Courts, is incorporated in the Bankruptcy Amendment Act, 1884. It never can have been intended to give to the authorities empowered to frame general rules the power to take away a right given in the principal Act.

CAVE, J. :

I have carefully considered this case, and I have come to the conclusion that the appeal cannot be heard. In my opinion, the objection which has been taken is fatal. The only real argument which has been put forward in support of the contrary contention is to the effect that Rule 199 of the Bankruptcy Rules, 1883, is *ultra vires*. But on looking at the different sections of the Bankruptcy Act it is clear that this is not the case. The right of appeal is given by section 104. But by section 121, "small bankruptcies" are dealt with, by which is meant those in which the property of the debtor is not likely to exceed 300*l.*, in which case the Court may make an order that the debtor's estate be administered in a summary manner, and thereupon the general provisions of the Act are subject to considerable modifications. Now, that section has without doubt a distinct, and, I must admit, in my opinion, a praiseworthy object. The object was undoubtedly to save expense, and to provide that as much of the estate as possible might be saved for division amongst the creditors. In carrying out this object, the modifications in question became necessary, and of those modifications some are at once introduced into the Act itself, while by sub-section (3) of section 121 it is further provided that "such other modifications may be made in the provisions of this Act as may be prescribed by general rules with the view of saving expense and simplifying procedure." It is obvious that the legislature may give a right of appeal, and also that the legislature may withdraw that right, or it may empower any one with authority to do so, and if that person or body does withdraw that right, it is gone as much as if the legislature had done it. Rule 199, sub-section (5), is undoubtedly a modification of the provisions of the Act in the explicit terms that "no appeal shall lie from any order of the Court, except by leave of the Court." It is clearly a modification within the provisions of the Act, and it is moreover framed with the commendable object of saving expense and simplifying procedure, for unquestionably the most effective manner of saving expense is to limit the right of appeal. There is nothing so extravagant as a series of appeals. I am clearly of opinion that Rule 199 is within the operation of sub-section (3) of section 121, and I think, also, that it is calculated to secure the

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distinct object of the Act. The legislature might easily have said that nothing in section 121 should permit a modification of the powers of appeal, but it has not done so, although there is a provision in the sub-section excluding from modification the provisions relating to the public examination or discharge of the debtor. I am of opinion, therefore, that the requisite leave not having been obtained, this appeal cannot be heard.

WILLS, J.:

I am of the same opinion. The case is one of considerable importance, however, and I will add a few observations. The right of appeal here is not a common law right of appeal, but a statutory right given by a particular statute. It is clear, therefore, that the same statute which gives the right may also delegate to a prescribed authority the power to modify the right. It is unnecessary to discuss whether the particular modifications embodied in Rule 199 were introduced by the proper authority, and in the proper manner, for as to this no question can be raised. They are also to be framed for a particular purpose—that of saving expense and of simplifying procedure—and there cannot be the least doubt that Rule 199 aims at that object. But the importance of the argument which has been raised lies in the fact that it has been suggested that some of these rules may be *ultra vires*. It seems to me a matter for serious consideration whether in the face of section 127, sub-section (2), anything in the rules made under the Bankruptcy Act, 1883, can be considered *ultra vires* after the provisions of that section have been complied with and the rules have been before Parliament for three weeks. The question may hereafter be raised on another occasion, and I am altogether unwilling therefore to prejudge the case. At the same time, I cannot help expressing my opinion that such case would have to be one of very great strength.

Appeal dismissed with costs.

Solicitors: *Tanner* for the appellant.

The Solicitor to the Board of Trade.



IN RE SANDWELL, EX PARTE ZERFASS.

*Bankruptcy Act, 1883, Sections 55 and 121—Bankruptcy Rules, 1883,
Rule 232.*

BEFORE
MR. JUSTICE
CAVE.
1885.
March 9.

Small Bankruptcy—Disclaimer.

Held: That where in accordance with the provisions of section 121 of the Bankruptcy Act, 1883, relating to small bankruptcies, an order is made for the summary administration of a bankrupt's estate, and the official receiver, as trustee in the bankruptcy, disclaims leasehold property of the bankrupt without the leave of the Court under the powers conferred on him by Rule 232 of the Bankruptcy Rules, 1883, the Court has no jurisdiction to give any compensation to the landlord out of the estate for the use and occupation of such leasehold property by the official receiver as such trustee.

THIS was an application on behalf of one *Philip Zerfass*, for an order that the chief official receiver should pay to the applicant, out of the estate of the debtor *Sandwell*, the sum of 36*l.* 18*s.* or such other sum as the Court might determine, for rent during the occupation by the chief official receiver as trustee, of certain premises, known as 93, Kingsland Road, in the county of Middlesex. And also, for an order that the costs of an incidental to this motion might be paid out of the estate.

From the facts it appeared that the debtor *Sandwell* held a lease of the premises in question, bearing date January 11th, 1883, for twenty-one years from September 29th, 1882, at a rental of 160*l.* a-year.

On July 14th, 1884, a receiving order was made against the debtor, and the Court subsequently granted an order for the summary administration of the estate under section 121 of the Bankruptcy Act, 1883, and the official receiver thereupon became trustee.

A proposal was made that the furniture of the bankrupt should be sold upon the premises, but a covenant in the lease having been discovered forbidding this, negotiations were entered into with Mr. *Zerfass*, the landlord, for a waiver of the covenant, and an arrangement was finally come to by which it was agreed that the sale might be held on condition (1) that the sum of 21*l.*, being certain arrears of rent due on March 25th, 1884, should be paid; (2) that

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the rent due for the quarter ending June 24th should be paid; and, *as alleged by Mr. Zerfass*, (3) that any further rent which might become due, up to the giving up possession of the premises, should be made good. This last condition was however denied.

The two first conditions were performed, and the sale was held on August 19th. The lease being of no value, the official receiver, under section 55 of the Bankruptcy Act, 1883, and Rule 232 of the Bankruptcy Rules, 1883, and, without the leave of the Court, disclaimed the property.

The key of the premises was not actually delivered up to Mr. Zerfass, the landlord, however, until September 19th, and the claim was now made for rent accruing due for the time during which it was alleged the official receiver had held possession of the premises for the benefit of the estate up to the date when possession was given up.

F. C. Willis for the landlord:

There are two questions—(1) whether there was not an agreement to pay this rent. As to that there is a conflict of testimony. (2) Whether, even assuming there is no evidence of any agreement, Mr. Zerfass is not entitled to payment. The bankruptcy was a small bankruptcy under section 121, and the official receiver became trustee. The official receiver has disclaimed without coming to the Court as allowed by Rule 232, which provides that “a lease may be disclaimed without the leave of the Court in any of the following cases, namely, where the bankrupt has not sublet or assigned the lease, or created any mortgage or charge thereon; and (b) The estate is administered under the provisions of section 121 of the Act.” The intention of section 121 and Rule 232 is to save expense; the official receiver need not come to the Court. But it does not take away any rights of a landlord, which would exist if the official receiver had to come to the Court under section 55. The mere fact of disclaiming without leave does not get rid of the necessity of imposing terms. Where premises are retained, and the estate gets the benefit of such retainer, the landlord is entitled to be paid his rent. [*Counsel here adduced evidence to show that a special arrangement was made that the rent should be paid.*] But even assuming that it is not proved to the satisfaction

of your Lordship that a special arrangement was made in this case, I submit that the landlord is nevertheless entitled to the rent up to the time when possession was given to him. In the case of *Ex parte Isard, In re Bushell* (L. R., 23 Ch. Div. 115; 48 L. T. 502), it was held that "the principle on which the Court should exercise its discretion under Rule 28 of the Bankruptcy Rules, 1871, is that the trustee ought not to be allowed to increase the bankrupt's estate at the expense of the landlord." It may be said that under section 121 and Rule 232 of the new Act, there was no necessity to apply to the Court, but the Court will not take away from the landlord his rights. Even if the official receiver does disclaim without leave it does not take away a right which the landlord would have if the official receiver had to come to the Court to disclaim.

Muir Mackenzie for the official receiver:

I submit that in this case the right to disclaim was absolute, and having been exercised there is no power in the Court to order the trustee to pay rent. Section 55 provides: "(1.) Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within three months after the first appointment of a trustee, disclaim the property. Provided that where any such property shall not have come to the knowledge of the trustee within one month after such appointment, he may disclaim such property at any time within two months after he first became aware thereof. (2.) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date

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when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person." If the disclaimer is valid all liability ceases. Again, by sub-section (3), "a trustee shall not be entitled to disclaim a lease without the leave of the Court, except in any cases which may be prescribed by general rules, and the Court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenants' improvements, and other matters arising out of the tenancy as the Court thinks just." Then by Rule 232 "a lease may be disclaimed without the leave of the Court where . . . the estate is administered under the provisions of section 121 of the Act." Therefore I say, given a lease, and given a summary administration; given a disclaimer by the official receiver, the disclaimer is without the leave of the Court, and it operates to put an end to the liabilities of the official receiver. There is no application before your Lordship on which terms can be imposed. There is no jurisdiction and no liability for rent. There is nowhere in the Act a provision where an order can be made upon the trustee to pay rent. The only power is to say that a trustee shall not have the right to disclaim unless he complies with certain terms as to rent. There is no hardship. By sub-section (7) of section 55, "any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy." If a landlord is injured by the effect of a disclaimer he is considered to be a creditor to the extent of the injury. Where the Legislature thought it right to give the power of disclaimer without leave all liability ceases. I submit that there is no power to make the order asked for.

Cave, J.:

Judgment.

The first point in this case is whether there was an agreement between Mr. Zerfass, the landlord, and the official receiver, that the official receiver should pay rent. I am of opinion that there was no such agreement. The evidence shows that the permission

asked for was given by the landlord, in consideration of the payment of the 21*l.* and the 21*l.* alone. Then there is the other point—an important point—whether I have any authority to order the official receiver to pay anything by way of compensation to the landlord for occupation of the premises until September 19th. In order to justify me in doing so I must find some power in the Act. If the Act gives me no power I cannot make it. My powers are strictly limited by the terms of the Act and Rules. Now the section regulating disclaimer is section 55, which provides in sub-sections (2) and (3) [*his Lordship read the sub-sections*]. There is a power to impose conditions, but the clause is express, and is that the Court may, before or on granting leave, impose terms as a condition of granting leave. Now, in this case, Rule 232 enables the trustee to disclaim without the leave of the Court, and that being so, my power to impose terms as a condition of granting leave is gone. I do not know the intention of the Act, but so it is. So long as the rule stands, the trustee can disclaim without leave; and so long as he can do so, there is no power given to me to make any order as to conditions. I am of opinion, therefore, that I have no power to make the order asked for, and the application must be dismissed with costs.

Application dismissed with costs.

Solicitors: *Rowland H. Ward* for Mr. Zerfass, the landlord.
W. W. Aldridge for the Chief Official Receiver.

CASE relied upon or referred to:—

Ex parte Isard, In re Bushell, L. R., 23 Ch. Div. 115; 48 L. T.

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 IN RE
 SANDWELL,
 EX PARTE
 ZERFASS.

BEFORE
MR. JUSTICE
CAVE.
1885.
March 10.

IN RE GILLESPIE, EX PARTE REID & SON.

Bankruptcy Act, 1883, Section 38.

Mutual Dealings—Set-off.

Held: That, as a general rule, and in the absence of special circumstances where there are mutual dealings between a debtor and his creditors, the line as to set-off must be drawn at the date of the commencement of the bankruptcy.

THIS was an application on behalf of Messrs. *Reid & Son*, creditors of the bankrupt, for an order that the trustee in the bankruptcy should refund to them the sum of 100*l.*, being the amount of an acceptance paid by them under protest on July 16th, 1884.

The facts of the case were as follows:—

Both the applicants and the bankrupt were West India merchants. The acceptance in question was a bill for 100*l.* payable ninety days after sight, drawn at Grenada upon Messrs. *Reid & Son*, and endorsed to *La Motte & Co.* of Grenada, and remitted by this latter firm to *Gillespie*, the bankrupt, with instructions that it should be put to the credit of an account which *La Motte & Co.* then had with *Gillespie*.

On April 9th, 1884, a receiving order was made against *Gillespie*, who at that time owed Messrs. *Reid & Son* the sum of 138*l.* on the account current between them.

On April 12th the bill in question arrived in this country, and was sent on, a day or two afterwards, to Messrs. *Reid & Son* for their acceptance.

A good deal of negotiation took place, but the bill was at length accepted by Messrs. *Reid & Son*, who, however, claimed to set off the amount payable thereon at maturity against their debt of 138*l.*

The 100*l.* was subsequently paid at maturity by Messrs. *Reid & Son* to the trustee in the bankruptcy, under protest, and an order was now asked for that it might be refunded.

Pyke for Messrs. *Reid & Son*.

The amount of the bill ought to be refunded. It was only accepted on the condition that if the debt due from *Gillespie* to

Messrs. *Reid & Son*, which was at the time of acceptance unascertained, should prove to be equal or more than the amount of the bill, then the bill should be a set-off. But I say further, that the fact that the bill was accepted after the receiving order was made does not deprive Messrs. *Reid & Son* from setting off the amount due to them from *Gillespie*. In sect. 38 of the Bankruptcy Act, 1883, no time is limited. Sect. 38 says, "Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order shall be made under this Act, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had, at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor, and available against him." I submit that the latter part of the section does not apply where the person proving against the estate becomes indebted to it after the date of the bankruptcy. In the case of *Elliott v. Turquand* (L. R., 7 App. Cas. 79), it was held that the object of sect. 39 of the Bankruptcy Act, 1869, which is practically the same as sect. 38 of the new Act, is, "that where there are mutual accounts, a secret act of bankruptcy should not stop the currency of those accounts; the existence of mutual dealings and accounts protects the credits and debts on each side from the operation of the act of bankruptcy until notice of it. The exact date at which a mutual account is to stop must depend on the circumstances of the case and the nature of the credits, but may and ought to be taken at least up to the date when the person claiming the benefit of the section has notice of an act of bankruptcy." And in the same case, at pp. 86 and 87, Sir MONTAGUE SMITH, in delivering the judgment of the Court, said, "The proviso at the end is, 'but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a bankrupt in any case where he had at the time of

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giving credit to the bankrupt notice of an act of bankruptcy.' The proviso says nothing with regard to credit given by the bankrupt to such person. The insertion of this proviso shows that the substantive part of the section cannot be read as referring only to mutual dealings and accounts prior to the act of bankruptcy, because if it had been intended that the account was to stop at the act of bankruptcy the proviso would be meaningless and an unnecessary addition to the section. By fair implication, therefore, it may be taken that the Legislature did not so intend. The existence of mutual dealings and accounts protects the credits and debts on each side from the operation of the act of bankruptcy until notice of it. It is unnecessary for their Lordships to decide what is the precise period at which an account of this kind, viz., an account of mutual dealings and transactions, is to stop. That must depend on the circumstances of each case and the nature of the credits; but their Lordships think that, at least up to the time when the party who claims the benefit of the clause has notice of an act of bankruptcy, the mutual account may and ought to be taken." I submit, first, therefore, that the bill was only accepted on condition that *Gillespie* should not demand payment under it unless it should appear that a sum as great as the bill was not due from the bankrupt to Messrs. *Reid & Son*. [*Evidence of such an agreement was adduced.*] And I say further, that even without such an agreement, the right of set-off exists.

Yate Lee for the trustee:

The rule is now that from the commencement of the bankruptcy there can no longer be mutual dealings. In this case the receiving order was made on April 9th. The bill, which was received by the trustee on April 12th, after the commencement of the bankruptcy, and sent by him to Messrs. *Reid & Son*, could not make any mutual dealing. It is a dealing after the commencement of the bankruptcy between the trustee and Messrs. *Reid & Son*. It wants mutuality. The line is drawn from the commencement of the bankruptcy. The fact is, that whereas at the date of the bankruptcy *Reid & Son* were creditors to the extent of 138*l.*, it is suggested that they should be paid 100*l.* in full, and only have to prove for the 38*l.* In the case of *In re Milan Tramways Company*,

Ex parte Theys, L. R., 25 Ch. Div. at page 591, SELBORNE, Lord Chancellor, in his judgment says: "The 10th clause of the Judicature Act, 1875, refers only to a company unable to pay its debts, but I am of opinion that it must be treated as applicable to any company in liquidation until it is shown that the assets are sufficient for payment of the debts in full. Now, under section 39 of the Bankruptcy Act, 1869, the line is drawn at the time of the bankruptcy, and the rights of the parties are not to be altered by subsequent transactions." And in the same case, Lord Justice FRY, says: "In *Dickson v. Evans* (6 T. R. 57, 59), Lord KENYON says: 'In cases of this sort the question must be considered in the same manner as if it had arisen at the time of the bankruptcy, and cannot be varied by any change of situation of one of the parties.' That has been the uniform rule." The principle which underlies this case is that which is found in all cases of set-off—there is no valid transaction which takes place after the commencement of the bankruptcy.

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CAVE, J.:

I am of opinion that in this case my judgment must be in favour Judgment. of the trustee. The first question which arises is as to the negotiations which took place between Messrs. Reid & Son and the trustee. As to that I will say that I am not satisfied that any condition was made that the set-off should be allowed if the bill was accepted. But there arises the other most important question that the bill having been accepted, have Messrs. Reid & Son a right to set-off a debt due to them from the estate of the bankrupt? That depends upon the interpretation of section 38. The important point is down to what time the mutual dealings can go on to give the right of set-off. The question is in my opinion rightly decided in the case of *In Re Milan Tramways Company, Ex parte Theys*. In that case, the Lord Chancellor says: "Now, under section 39 of the Bankruptcy Act, 1869, the line is drawn at the time of the bankruptcy, and the rights of the parties are not to be altered by subsequent transactions. A person comes in to prove a debt against the bankrupt's estate; if there are mutual credits between the bankrupt and the creditor, then an account is to be taken, and the balance is to be proved against the estate, or paid to the estate,

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as the case may be. . . . It is impossible that a person, who at the time of the bankruptcy owes a debt to the bankrupt, and has no right of set-off, can acquire such a right by taking an assignment of another debt due to another creditor of the bankrupt." It has been urged on behalf of Messrs. *Reid & Son* that section 38 of the Bankruptcy Act, 1883, does not state a time when the mutual dealings are to stop, and that the case of *Elliott v. Turquand* (L. R., 7 App. Cas. 79), shows that the line is not drawn at bankruptcy itself. But in that case there was a secret act of bankruptcy, and it falls short in showing anything which would justify me in coming to a decision in favour of Messrs. *Reid & Son* in this case. To do so I should have to take a serious step further. Also, in the same case of *In re Milan Tramways Company*, Lord Justice FRY says: "The 39th section of the Bankruptcy Act, 1869, refers to the state of things at the time of the bankruptcy." The only modification is that when an act of bankruptcy is secret it refers to the time when the act of bankruptcy becomes known. Here it was well known when the bill was presented that *Gillespie* had committed an act of bankruptcy. I am of opinion that the case falls within the general doctrine laid down in *In re Milan Tramways Company*, and not within the special case of *Elliott v. Turquand*. The application will therefore be refused, with costs.

Application refused.

Solicitors: *Irvine & Hodges* for Messrs. *Reid & Son*.
Druces, Sons & Attlee for the trustee.

CASES relied upon and referred to:—

Elliott v. Turquand, L. R., 7 App. Cas. 79; 51 L. J. P. C. 1; 45 L. T. 771.

In re Milan Tramways Company, Ex parte Theys, L. R., 25 Ch. Div. 587.

IN RE H. PEARCE, EX PARTE CROSTHWAITE.

*Bankruptcy Act, 1883, Section 46.**Several writs of fi. fa.—Notice to Sheriff of Bankruptcy Petition—Title to Proceeds of Sale.*

BEFORE
MR. JUSTICE
CAVE.
1885.
March 10.

The sheriff was in possession of the goods of a debtor under several writs of *fi. fa.*—the three first of which according to date were for more than 20*l.*, and the fifth for 12*l. 13s.*

The sale was held, and the sheriff, having received notice within fourteen days of a bankruptcy petition against the debtor, paid in the proceeds of the sale to the official receiver as trustee in the bankruptcy.

The amount of the three prior writs exceeded together the amount realized by the sale.

On a claim by the execution creditor under the subsequent writ for 12*l. 13s.*—that he was entitled to be paid the amount of his debt in full:

Held: That it was not the effect of section 46 of the Bankruptcy Act, 1883, to make executions for more than 20*l.* altogether void, but to deprive the execution creditor of the benefit of the execution: that if no bankruptcy had occurred the writs would have been paid in order of date: and that under the Act the sheriff was required to pay over to the trustee in the bankruptcy the amount which would have been appropriated to the first writs.

THIS was a motion on behalf of one *R. Crosthwaite* for an order that the trustee in the bankruptcy of *H. Pearce* might be directed to pay over the sum of 12*l. 13s.*—the amount of an execution levied on the goods of the bankrupt under a *fi. fa.* issued at the instance of the said *Crosthwaite* before the receiving order was made.

On April 10th, 1884, judgment was recovered by *Crosthwaite* against *Pearce*, and the writ was subsequently lodged with the sheriff, who was then in possession of the goods of the bankrupt under several other writs, of which the first in order of priority was for 41*l.*, the second for 6*l.*, the third for 47*l.*, the fourth for 34*l.*, and the fifth, that of *Crosthwaite*, for 12*l. 13s.*

On May 12th the sheriff sold all the goods which he had seized, such sale realizing a balance, after deducting rent and other charges and expenses, of 89*l. 19s.*

This sum the sheriff continued to hold until May 22nd, when notice was given to him of a bankruptcy petition having been that day presented against the debtor.

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Subsequently, after adjudication, the sheriff paid 6*l.* to the execution creditor, whose writ was second in point of time, and handed over the balance to the trustee in the bankruptcy in accordance with section 46, sub-section (2) of the Bankruptcy Act, 1883, which provides that: "Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding 20*l.*, the sheriff shall deduct the costs of the execution from the proceeds of the sale and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon, or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor."

Application was now made on behalf of *Crosthuait*, as an execution creditor for 12*l.* 13*s.*, that that sum should be refunded to him by the trustee.

H. Reed for the execution creditor:

My contention is that the executions held by the sheriff for sums of 20*l.* and upwards were avoided by sect. 46, sub-sect. (2), of the Bankruptcy Act, 1883, and consequently that Mr. *Crosthuait*'s execution was let in, and the sheriff ought to have paid him the 12*l.* 13*s.* It is clear that it cannot be said that because there are several writs all amounting to more than 20*l.* a creditor under 20*l.* should be deprived of his security. It is clear, also, that a person who has levied before an act of bankruptcy is still a secured creditor. But in this case the trustee says, "True, you seized and may be entitled, but there are prior writs which are bad against me, and I step into the shoes of those persons who have issued such writs, and say they are good against you and deprive you of your security." There are many cases where a sheriff has levied under two writs the first of which is bad against assignees, the second takes the benefit and is entitled to payment. If the execution is of no avail for the creditor, the trustee cannot set it up. It is altogether bad. Here the trustee claims not under but in spite of the execution. There is nothing in the words of the Act which affect my security.

Fraser Macleod (Macdonell with him) for the trustee:

The amount of the debts, independent of that of the applicant, amounted to something like 128*l.* If these execution creditors had been allowed to take advantage of their executions, the whole amount realized would have been eaten up. Mr. Crosthwaite would have got nothing. All we have to look at is the wording of sect. 46, sub-sect. (2). Independently of the Bankruptcy Act, inasmuch as the other writs were first, the sheriff would be entitled to pay them first. How is that altered by the Bankruptcy Act, 1883? It does not make the execution null and void, but it says that when the required notice is given to the sheriff he shall pay the money over to the trustee. The section gives a direction to the sheriff what he shall do with the money. The trustee is entitled to place himself in the position of the execution creditor.

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[CAVE, J.: The case is of some importance, and is not covered by authority. I will give judgment at a future day.]

March 23rd.

CAVE, J.:

In this case an application was made by an execution creditor of Judgment, the bankrupt for an order on the trustee to pay over to the applicant 12*l.* 13*s.*, the amount which the sheriff was directed to levy on the goods of the bankrupt under a *fi. fa.* issued at the instance of the applicant.

In the beginning of May, 1884, the sheriff was in possession of the goods of the bankrupt under several writs, of which the first in order of priority was for 41*l.*, the second for 6*l.*, the third for 47*l.*, the fourth for 34*l.*, and the fifth (that of the applicant) for 12*l.* 13*s.*

On May 12th the sheriff sold all the goods which he had seized, and realized a balance, after deducting rent and other charges and expenses, of 89*l.* 19*s.*

This sum the sheriff continued to hold until May 22nd, when he had notice of a bankruptcy petition having been that day presented against the debtor; and subsequently, after adjudication, he paid 6*l.* to the execution creditor whose writ was second in point of time, and handed over the balance to the trustee.

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Section 46 (2) of the Act of 1883 enacts that, where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding 20*l.*, the sheriff shall deduct the costs of the execution from the proceeds of a sale and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon, or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor.

Mr. Reed, for the applicant, contended that the executions held by the sheriff for sums of 20*l.* and upwards were avoided by this section, and consequently that the applicant's execution was let in, and that the sheriff ought to have paid him his 12*l.* 13*s.*

Some light will be thrown on the question by considering what is the duty of a sheriff who has several writs to execute. The case of *Aldred v. Constable* (6 Q. B. 370) shows that the duty of the sheriff is to execute—first, that writ which is first delivered to him, and when he has sold enough to satisfy that writ, he should sell under the next in order. Thus, in the present case, the sheriff's duty was to sell under the first writ until he had realized a net sum of 41*l.*; he was then to sell under the next writ until he had realized a further sum of 6*l.* to satisfy the second writ, and then to continue the sale under the third writ. The goods did not realize enough to satisfy the third writ, and consequently his duty to sell under the fourth and subsequent writs never arose, from want of goods to sell, and as to these writs the proper return for the sheriff to make was one of *nulla bona*. Having sold all the goods and realized only 89*l.* 19*s.*, the sheriff had in his hands 41*l.* realized under the first writ, 6*l.* realized under the second, and the balance realized under the third writ, and he had nothing in his hands under the subsequent writs. Now applying the statute to this state of things, when the sheriff got notice of a petition and found it was followed by adjudication, he was bound to pay over to the trustee the sum he held in his hands for the first and third creditors, because their judgments were for over 20*l.*, but as to the 6*l.*, he was bound to pay that to the second creditor. The sheriff never sold under the fourth or subsequent writs, and consequently the

position of those creditors cannot be better than if the sheriff had seized under their writs and not sold, in which case the first clause of section 46 would have applied.

Now, undoubtedly, if two writs are delivered to the sheriff successively and the prior one is for any reason void, the sheriff must disregard it and execute the second (*Christopherson v. Burton*, 3 Exch. 160), and, if I were satisfied that the effect of section 46 is to render writs of execution in respect of a judgment for a sum exceeding 20*l.* void, I should have to decide in favour of the applicant; but I cannot see that that is the effect of the section, which only directs the sheriff what he is to do with money he holds for the execution creditor, but nowhere enacts that the execution shall be void, although undoubtedly the effect is that the execution creditor where his judgment is for a sum exceeding 20*l.* loses the benefit of it.

Mr. Reed in support of his argument referred to some cases decided under the 6 Geo. 4, c. 16, section 108, which it is necessary to consider. That section enacted that no creditor having security for his debt, or having made any attachment in London or any other place by virtue of any custom there used of the goods and chattels of the bankrupt, should receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon, any part of the property of such bankrupt before the bankruptcy: Provided that no creditor, though for a valuable consideration, who should sue out execution upon any judgment obtained by default, confession, or *nil dicit*, should avail himself of such execution to the prejudice of other fair creditors, but should be paid rateably with such creditors.

The first case under the Act appears to have been *Taylor v. Taylor* (5 B. & C. 392), in which the Court of King's Bench refused to set aside at the instance of the assignees as void an execution on a judgment by *nil dicit*, where after seizure and before sale the execution debtor had become bankrupt. This case was followed by that of *Wymer v. Kemble* (6 B. & C. 479), in which it was held that where an execution upon a judgment by default had been perfected by seizure and sale before the bankruptcy, the execution creditor was entitled to the proceeds.

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 CROSTHWAITE.

Then came the case of *Notley v. Buck* (8 B. & C. 160), in which the same Court held that where the sheriff had seized the goods of an execution debtor under two executions upon judgments by *nil dicit*, and had after the execution debtor had become bankrupt sold the goods and paid the proceeds to the execution creditors, he was liable to refund the amount to the assignees, but the Court refused to decide whether he was a wrongdoer in selling under the writ.

The case of *Goldschmidt v. Hamlet* is very imperfectly reported in Manning & Granger, Vol. 6, p. 187; but it appears to decide that, where the sheriff had seized under several writs before the bankruptcy, and the first of such writs was upon a judgment on a warrant of attorney, the effect of the statute was not to transfer the right of the first execution creditor to the assignees, but to avoid or supersede that execution, leaving to the other execution creditors the advantage which the Act secured to them as claiming under executions which had been levied by seizure before the bankruptcy.

In *Cheston v. Gibbs* (12 M. & W. 111) it was held that a sheriff, who *bona fide* and without notice of a prior act of bankruptcy, had seized under a *fi. fa.*, was liable to the assignees in trover for selling after the *fiat*, the execution being founded on a warrant of attorney. This decision was arrived at on the ground that the 108th section affected the operation of the writ, and did not merely direct the application of the money levied under it, the words, "no creditor shall avail himself of such execution," being held to mean that such an execution should not be carried into effect for the benefit of the creditor.

The same point which had arisen in *Goldschmidt v. Hamlet*, came before the Court of Queen's Bench in *Graham v. Witherby* (7 Q. B. 491), when that Court, after taking time to consider its decision, followed the previous cases, and held that where the execution was founded on a warrant of attorney, the effect of section 108 was to make a sale by the sheriff after the *fiat* illegal, and so to let in a subsequent execution creditor on a judgment in an adverse *bona fide* action who had seized before the *fiat*, and that the section did not merely transfer the produce of the sale from the first judgment creditor to the assignees.

These cases are, however, not applicable to the case now under

discussion, first, because in those cases there was a subsequent sale by the sheriff which was invalidated by the express words of the section, "No creditor shall avail himself" of such execution; and, secondly, because if the first execution was void, the subsequent one having been executed by seizure before the *fiat* was within the exception contained in the 108th section.

In this case, on the contrary, there are no words in section 46 (2), which invalidate the sale by the sheriff, and indeed under that clause the sale must necessarily take place before it can be known whether the execution creditor will or will not ultimately be entitled to the proceeds; and, secondly, the words of the statute do seem to imply that the benefit of the execution is to be transferred from the execution creditor to the trustee for the benefit of the creditors generally; as soon as the sheriff has sold he holds the proceeds of the sale for the execution creditors in the order of their priority, and the section simply provides that, instead of handing this money over to the execution creditor, whose judgment exceeds 20*l.*, the sheriff shall hand it over to the trustee. If the sale is not invalidated, but merely the proceeds are transferred from the execution creditor, whose judgment is over 20*l.*, to the trustee, it follows that the sheriff in this case never sold under the applicant's writ, and never had in his hands any money to the use of the applicant, and the applicant is only an execution creditor who has seized but has not sold, and whose execution consequently is avoided by section 45.

The case of *Ex parte Lovering, In re Peacock* (L. R., 17 Eq. 452), which was decided under the Act of 1869, is also distinguishable, for in that case the execution creditor got a security by the seizure which there was nothing in the Act to take from him. Under the present Act the execution creditor gets no benefit by seizure alone. He must complete his execution by sale before the date of the receiving order. In this case the sheriff sold under the three first executions, and held the proceeds for those creditors only, and not for the present applicant.

Nor is there any injustice in this result. At common law the applicant would have got nothing by his execution; and although where the judgment is over 20*l.* the Legislature has thought fit to take from the execution creditor the benefit of the execution, and

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give it to the creditors at large, it is impossible to understand what justice there would be in taking away from an execution creditor on a judgment over 20*l.* the benefit of his execution, not to give it to the creditors at large, but to give it to execution creditors on judgments under 20*l.* It is impossible to conceive why the one kind of judgment creditors should be favoured at the expense of the other.

Motion refused with costs.

Solicitors : *Walker, Mewburn & Walker* for the execution creditor.
W. W. Aldridge for the trustee.

CASES relied upon or referred to :—

Aldred v. Constable, 6 Q. B. 370.
Christopherson v. Burton, 3 Ex. 160.
Taylor v. Taylor, 5 B. & C. 392.
Wymer v. Kemble, 6 B. & C. 479.
Notley v. Buck, 8 B. & C. 160.
Goldschmidt v. Hamlet, 6 M. & G. 187.
Cheston v. Gibbs, 12 M. & W. 111.
Graham v. Witherby, 7 Q. B. 491.
Ex parte Lovering, In re Peacock, L. R., 17 Eq. 452 ; 43 L. J., Bank. 58 ; 29 L. T. 897.



DIVISIONAL
COURT.

BEFORE
CAVE, J.
and
WILLS, J.

1885.

March 18.

IN RE WALSH, EX PARTE THE TRUSTEE.

Bankruptcy Act, 1883, Section 4, sub-section 1 (h).

Act of Bankruptcy—Notice of Suspension of Payment of Debts.

Held : That the fact that a debtor called a meeting of his creditors at which he laid before them his position, and made an offer of 6s. 8d. in the pound, did not amount to a notice by such debtor "that he has suspended, or that he is about to suspend payment of his debts," so as to constitute an act of bankruptcy under section 4, sub-section 1 (h) of the Bankruptcy Act, 1883.

THIS was an appeal from a decision of the learned Judge of the County Court of Liverpool, by which he refused to order that

Messrs. *Gartside & Falkner*, solicitors, of 67, Princes Street, Manchester, should pay to the trustee in the bankruptcy of *J. W. Walsh* the sum of 89*l.* 9*s.* 6*d.* monies alleged to have been received by them from the bankrupt, as being in their hands at the time and after an act of bankruptcy committed by the bankrupt, of which they had notice.

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The bankrupt, *J. W. Walsh*, who was a contractor carrying on business at Liverpool, had been in difficulties for a considerable time.

On May 20th, 1884, he consulted Messrs. *Gartside & Falkner* as to the position of his affairs, and according to their advice it was arranged that the debtor should not make any further payments himself, but that all monies to be received and paid from that day should be received and paid through Messrs. *Gartside & Falkner*.

Subsequently the debtor disclosed to Messrs. *Gartside & Falkner* such a condition of affairs that they advised steps to be taken to summon a meeting of the creditors in order to lay before them the whole matter and ascertain if such creditors were willing to accept an offer of 6*s.* 8*d.* in the pound.

On June 13th, 1884, this meeting of the creditors was held, and resolutions were passed that the debtor, *Walsh*, should assign all his property to a trustee, and that a committee of inspection should be appointed to report upon the offer made.

The committee reported unfavourably, however, and the arrangement became abortive.

On June 19th, 1884, the bankrupt filed a statutory declaration of inability to pay his debts; a petition was presented by a creditor, and on June 20th a receiving order was made.

An application was afterwards made to the County Court by the trustee in the bankruptcy, for an order that Messrs. *Gartside & Falkner* should refund to him the sum of 89*l.* 9*s.* 6*d.*, monies of the bankrupt, paid away by them between June 13th, the day of the meeting of creditors, and June 19th, when the statutory declaration was filed, on the ground that an act of bankruptcy was committed on the prior date of June 13th, of which they had due notice.

The learned County Court judge in declining to make the order

1885. asked for said, "By the motion in this case application is made to the Court to order Messrs. Gartside & Falkner to pay to the trustee in the bankruptcy of *J. W. Walsh* a sum of 89*l.* 9*s.* 6*d.* received by one of their firm from the bankrupt. The petition was filed on June 20th, 1884, and a receiving order was made on the same day. From the evidence of Mr. *Falkner*, a member of the firm of *Gartside & Falkner*, it appears that he began to act as solicitor to the bankrupt on May 20th, 1884, and that from what he learned from the bankrupt of his affairs, he knew he was at the time insolvent. By the instructions of the bankrupt he called a meeting of his creditors, which was held on June 13th. . . . At the meeting 6*s.* 8*d.* was offered by the bankrupt which was not accepted. A committee of inspection was appointed, and a subsequent offer of 10*s.* in the pound was made to them but refused. In his evidence given *viv^e voce* before me, Mr. *Falkner* said that at the meeting the bankrupt did not say that he had suspended or was about to suspend payment, but a statement of his affairs was read out by Mr. *Eckersley*, an accountant, and the offer of 6*s.* 8*d.* was based on that. Nothing could have been more deliberate than the bankrupt's conduct in this matter. He assembled his creditors; read a statement, by which it appeared that he could not pay his debts in full, and offered part payment. This was in fact telling them that he could not pay, and offering them something which was not payment but something else. It appears to me that the difference between this transaction and giving notice to his creditors that he has suspended or that he is about to suspend payment of his debts (which is made an act of bankruptcy by section 4, sub-section 1 (h) of the Bankruptcy Act, 1883), is a subtle one. On the other hand, to hold that whenever a trader calls his creditors together and offers them something less than the full amount of their debts, he commits an act of bankruptcy, might have far-reaching consequences. I am, however, as I think, bound by the judgments delivered in the case of *In re Friedlander, Ex parte Oastler & Co.* (see Volume I. p. 207; L. R., 13 Ch. Div. 474), in which more than one of the learned judges of the Court of Appeal held that a statement by a debtor that he is unable to pay his debts is not equivalent to a notice that he is about to suspend payment. I therefore feel bound to hold that there was no act of bankruptcy before the filing

IN RE WALSH,
Ex parte
THE TRUSTEE.

of the declaration of inability to pay which was dated on June 19th."

From this decision the trustee in the bankruptcy now appealed.

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THE TRUSTEE.

Kennedy for the trustee:

The main point is whether the case of *In re Friedlander, Ex parte Oastler*, applies to the present case. There it was held that "where a verbal statement was made by a debtor to one of his creditors that he was unable to pay his debts in full, such statement did not amount to a notice by the debtor 'that he has suspended, or that he is about to suspend, payment of his debts,' so as to constitute an act of bankruptcy under section 4, sub-section 1 (h), of the Bankruptcy Act, 1883." This case is distinguished by the fact that here it was not a casual statement to a casual creditor, but a formal meeting of creditors. The creditors were formally called together; a true statement was put forward showing 6s. 8d. in the pound; the debtor asked his creditors to come to a resolution on the statement; and a resolution was passed that the property should vest in a trustee. I submit that it is within the clause that the debtor gives notice to his creditors of suspension of payment. There was a distinct statement at the meeting of the creditors.

[*Cave, J.* : An attempt at an arrangement may be made without any intention of suspending payment of debts. Suppose the creditor said, as they did here, "We will not agree to the terms offered," what is to prevent the debtor going on?]

Having made a public statement of his insolvency, any subsequent payment would be a fraudulent preference.

[*Cave, J.* : The notice to suspend must be an absolute one.]

I submit that what was done here clearly shows an intention to suspend.

Cave, J.:

I am of opinion that the appeal must be dismissed. The question is, whether the debtor did give notice within section 4, sub-section 1 (h), of the Bankruptcy Act, 1883, "that he has suspended or that he is about to suspend payment of his debts." Now that is an act of bankruptcy when it is done. So is filing a declaration of inability to pay debts. But something neither the one nor the

1885. other, but a compound of the two, is not sufficient. I am unable to distinguish the principle of this case from the principle laid down in the case of *In re Friedlander, Ex parte Oastler*. Here there was no actual giving of notice by the debtor to the creditors. But it is argued there were such circumstances that everybody must come to the conclusion—that everybody must know—the debtor intended to suspend payment. I cannot agree to that. It might be thought that the debtor was trying to make good terms for himself, and that if the creditors did not accept the 6s. 8d. offered he would go on. I am not prepared to say the inference was that the debtor intended to suspend. In the case of *In re Friedlander, Ex parte Oastler*, Lord Justice LINDLEY said, "First, as to the words 'give notice.' That does not mean mere casual talk; it must be something formal, and given with the intention of giving notice." Here, so far from intending to give notice, it appears very much as if the debtor really intended to keep out of bankruptcy. I cannot see that he did anything to give notice to suspend as required, and the appeal must therefore be dismissed.

WILLS, J.:

I am of the same opinion. It is clear that if the debtor had said at the meeting, "I am hopelessly insolvent," that would not have been sufficient. If he had said, "I propose terms which, if accepted, involve suspension of payment," that would not have been sufficient. Why is it to be considered a notice of suspension because he says both of these things? There is nothing at all inconsistent with what he did, and his saying, "You do not accept my terms; I shall go on; so much the worse for you." The statute intentionally prescribed a very definite thing when it spoke of suspending payment. It is a term well understood amongst mercantile men. I, for my part, think it would be a mistake to extend its meaning. The appeal must, therefore, be dismissed.

Appeal dismissed with costs.

Solicitors: Pritchard & Englefield for F. Venn & Co., Liverpool,
for the trustee.

CASE referred to:—

In re Friedlander, Ex parte Oastler & Co., see Vol. I. p. 207;
L. R., 13 Ch. Div. 474.

IN RE ROBERTSON.

Bankruptcy Act, 1883, Section 14—Bankruptcy Rules, 1883, Rule 113.

Application to dispense with Deposit on Appeal.

Where application was made by a debtor who had presented a bankruptcy petition against himself to dispense with the deposit of 20*l.* required to be lodged upon an appeal against a decision of the registrar rescinding the receiving order at the request of the official receiver under section 14 of Bankruptcy Act, 1883,

Held: That the debtor's alleged inability to raise the necessary sum did not on the facts of the case constitute such a special circumstance under Rule 113 of the Bankruptcy Rules, 1883, as to justify the Court in granting the application.

THIS was an application in person by the debtor, *A. R. Robertson*, that the deposit required on an appeal from a decision of Mr. Registrar *Pepys* might be dispensed with.

The application was made under Rule 113 of the Bankruptcy Rules, 1883, which provides that, "At or before the time of entering an appeal, the party intending to appeal shall lodge in the High Court the sum of 20*l.*, to satisfy in so far as the same may extend, any costs that the appellant may be ordered to pay. Provided that the Court of Appeal may, in any special case, increase or diminish the amount of such security, or dispense therewith."

The facts showed that the applicant, who was a Scotchman, recently presented his own petition in bankruptcy in England, and a receiving order was made.

By reason of certain facts which were brought to the notice of the official receiver, however, an application was subsequently made to the Court by him, under section 14 of the Bankruptcy Act, 1883, which provides that, "If in any case where a receiving order has been made on a bankruptcy petition, it shall appear to the Court by which such order was made, upon an application by the official receiver, or any creditor or other person interested, that a majority of the creditors in number and value are resident in Scotland or in Ireland, and that from the situation of the property of the debtor, or other causes, his estate and effects ought to be distributed among the creditors under the bankrupt or insolvent

COURT OF
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JUSTICE,
BAGGALLAY,
L.J.,
LINDLEY, L.J.
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IN RE
ROBERTSON. laws of Scotland or Ireland, the said Court, after such inquiry as to it shall seem fit, may rescind the receiving order and stay all proceedings on, or dismiss the petition upon such terms, if any, as the Court may think fit."

Mr. Registrar *Pepys* thereupon rescinded the receiving order, from which decision the debtor *Robertson* stated his intention to appeal, and now made application to the Court of Appeal that the deposit of 20*l.* might be dispensed with.

The debtor *Robertson* in person stated the facts, and also read an affidavit in support, from which the only special circumstance put forward appeared to be the debtor's poverty and his alleged inability to raise the necessary sum.

[THE LORD CHIEF JUSTICE: If you cannot raise the 20*l.* for a deposit, what is the use of your presenting a bankruptcy petition yourself?]

My friends have offered to advance me sufficient to pay 2*s. 6d.* in the pound.

[THE LORD CHIEF JUSTICE: If your friends thought there was anything in your appeal I should think they would advance the necessary 20*l.*]

They will not do so.

THE LORD CHIEF JUSTICE:

Judgment. Really the only special circumstance why this deposit should be dispensed with is that the debtor cannot raise the 20*l.* But, as I have said, if he cannot raise the 20*l.*, what is the use of the petition by himself. It is said that his friends are willing to advance sufficient to pay 2*s. 6d.* in the pound. That being so, if there was anything in the appeal I should have thought it would have been easy to obtain from them the necessary sum. The application must be dismissed.

BAGGALLAY, L. J.:

By section 14 of the Bankruptcy Act, 1883, if, where a receiving order has been made, it shall appear to the Court that the bankruptcy proceedings ought to be carried on under the law of Scot-

land, the Court may rescind the order. That has been done in this case. The Court has thought that the bankruptcy had better be proceeded with in Scotland than here. Against that decision there is doubtless a right of appeal. The debtor now asks us under Rule 113 to dispense with the required deposit. But that can only be done if special circumstances are shown, and here, in my opinion, there is no special circumstance whatever.

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LINDLEY, L. J.:

I entirely agree.

Application refused.

Muir Mackenzie, for the official receiver, who had been served with notice of the application, asked for costs.

THE LORD CHIEF JUSTICE:

If no appeal is prosecuted we think you should have costs, but that if the appeal is prosecuted the costs should be reserved.

Solicitor : W. W. Aldridge for the official receiver.



IN RE KING, EX PARTE MESHAM.

DIVISIONAL COURT.

BEFORE
CAVE, J.,
and
WILS, J.

1885.
March 24.

Where an application made by a secured creditor for leave to withdraw or amend his proof put in from inadvertence for the full amount of the debt, and without mentioning the security, was refused by the County Court judge,

Held : That there was clearly no intention to give up the security, and that proof for the full amount of the debt having been put in from inadvertence, leave to amend ought to have been granted.

THIS was an appeal against an order of the learned judge of the Liverpool County Court, by which he refused the appellant, Colonel Mesham, leave to withdraw or amend a proof made by him in the bankruptcy of the debtor King on December 15th, 1884.

The debtor had for some time been the tenant of a farm belong-

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MESHAM.

ing to Colonel *Mesham*, at a rental of 200*l.* a year, and in November, 1884, he was indebted to his landlord for rent and arrears of rent in the sum of 393*l.*

On November 24th Colonel *Mesham* distrained for this sum of 393*l.*

On the same day the debtor *King* committed an act of bankruptcy, and on December 5th a receiving order was made against him.

A good deal of correspondence took place between Colonel *Mesham* and the official receiver, by whom it was pointed out that the whole amount which could be claimed by the landlord under the distress was one year's rent, viz., 200*l.*, and as a result of these negotiations an offer was finally made to withdraw the distress on the sale of the debtor's live stock, &c., and on an undertaking being given that the 200*l.* should be paid, the right to prove for the balance of 193*l.* being still retained.

This was not done, however, and on December 15th a proof was put in by Colonel *Mesham* in which, by inadvertence, the full amount of his debt of 393*l.* was claimed, and no security was mentioned.

In consequence of this, on December 24th, a letter was received by Colonel *Mesham* from the trustee who had been appointed in the bankruptcy by which he required him at once to withdraw the distress, on the ground that he had elected to prove for the full amount due to him, and that such proof had been duly admitted.

Application was thereupon made to the County Court for leave to amend or withdraw the proof, but this was refused.

From this refusal Colonel *Mesham* now appealed.

By the consent both of Colonel *Mesham* and the trustee the sale of the debtor's property was held on January 7th, 1885, but the money resulting therefrom remained in the hands of the auctioneer, who declined to pay over the 200*l.* to the landlord until the settlement of the dispute.

E. Cooper Willis, Q.C. (F. C. Willis with him), for Colonel Mesham, the landlord. After reading affidavits in support:

The evidence conclusively shows that the proof for the full amount was made inadvertently, and without any intention of

giving up the security. It was a clear mistake. The application to the County Court appears to have been refused by the learned judge on the ground that under the new Act he had no power to allow a withdrawal. Under the Bankruptcy Act of 1869 the words were very stringent—too stringent in fact. Under the new Act of 1883 it is provided by Rule 10 of Schedule I., that “For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence.” A creditor is not bound unless he has not only proved but also voted. In the present case when it was desired to have the proof expunged it had never been used.

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IN RE KING,
EX PARTE
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Hamilton for the trustee :

The ground on which the County Court judge refused the application was that the affidavits did not show any reason for acceding to the motion, or really explain the mistake which the creditor had made.

[CAVE, J.: Why should the landlord give up his distress. No man in his senses would do it, and no person could think he would do so. All the letters point to the fact that there never was any such intention.]

The official receiver felt that he ought to have the protection of the Court. At any rate the trustee ought to have his costs. The mistake was made by the creditor. In the case of *Ex parte Williams*, *In re Williams* (L. R., 18 Eq. 373), BACON, C. J., said: “I think that according to Rule 273 the appellant was entitled to withdraw his proof. . . . But the appellant must pay the costs of the application to the County Court, and also the costs of the appeal, for it is his own blunder which has rendered the proceedings necessary.” Upon the same principle, if amendment is made the costs both here and below ought to be paid by the creditor.

1885.

IN RE KING,
EX PARTES
MESHAM.

Judgment.

CAVE, J.:

I am certainly of opinion that this appeal must be allowed. The proof must be amended by reducing it by 200*l.* It is clear from the correspondence that there was no intention to abandon the security of the right to distrain, and that the proof of the whole rent was made by mistake. I cannot tell why the County Court judge did not take this view. As to the costs, we will not in this instance interfere with the costs as ordered in the Court below, but the trustee must pay the appellant his costs in the present case certainly, and if any similar case to this should again arise I hope due notice of what we have now done will be taken in the Court below.

WILLS, J.:

I am entirely of the same opinion.

Appeal allowed.

Solicitors: *Hamlin, Grammer & Hamlin* for Colonel *Mesham.*
Pemberton, Sampson & Jones for the trustee.

CASE relied on:—

Ex parte Williams, L. R., 18 Eq. 373.



DIVISIONAL
COURT.

BEFORE
 CAVE, J.,
 and
 WILLS, J.

1885.

March 24.IN RE BARNETT, EX PARTES THE TRUSTEE.

*Bankruptcy Act, 1883, Section 151 and Section 104—Bankruptcy Appeals
(County Courts) Act, 1884, Section 2.*

Solicitor's right of Audience.

Held: That under the Bankruptcy Act, 1883, and the Bankruptcy Appeals (County Courts) Act, 1884, a solicitor has the same right of audience in the Divisional Court sitting as a Court of Appeal from orders of the County Courts in bankruptcy matters, as that formerly possessed under the Bankruptcy Act, 1869, in the case of an appeal from the County Court to the Chief Judge in Bankruptcy.

THIS was an appeal on behalf of *E. Foreman*, the trustee in the bankruptcy of *Barnett*, from an order of the learned judge of the County Court at Croydon.

Fox, solicitor, for the trustee.

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IN RE
BENNETT,
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THE TRUSTEE.

Poyser for the respondent :

I do not wish to raise an unnecessary difficulty in this case. It has been suggested, however, that a solicitor has now no right of audience in this Court. It is true that section 151 of the Bankruptcy Act, 1883, provides that "nothing in this Act, or in any transfer of jurisdiction effected thereby, shall take away or affect any right of audience that any person may have had at the commencement of this Act, and all solicitors or other persons who had the right of audience before the chief judge in bankruptcy shall have the like right of audience in bankruptcy matters in the High Court." That section preserves such right of audience in the High Court. But by section 104, sub-section 2 (a), it was enacted that "an appeal shall lie from an order of the County Court to her Majesty's Court of Appeal." A solicitor had no right of audience there. Now section 104, sub-section 2 (a) is repealed by the Bankruptcy Appeals (County Courts) Act, 1884 (47 Vict. c. 9), which provides, in section 2, that appeals from a County Court in bankruptcy matters shall be to a Divisional Court of the High Court, of which the bankruptcy judge is to be a member. But the solicitor's right of audience is not revived. The Divisional Court is merely substituted for the Court of Appeal.

CAVE, J.:

I am of opinion that a solicitor has the right of audience here. Judgment. This case is a bankruptcy matter in the High Court, and it is a bankruptcy matter in the High Court of precisely the same kind as the Chief Judge used to hear under the Act of 1869. Under that Act a solicitor would have the right of audience, and in my opinion the right is not taken away.

The case was then proceeded with.

Solicitors: *Fox & Page* for the appellant.

Scott & Barham for the respondent.



DIVISIONAL IN RE HORNIBLOW, EX PARTE THE OFFICIAL RECEIVER.
COURT.

BEFORE
CAVE, J.,
and
WILLS, J. *Bankruptcy Act, 1883, Section 121—Bankruptcy Rules, 1883, Rule 237 (2).*
Small Bankruptcy—Refusal of Registrar of County Court to make Order for
Summary Administration.

MARCH 25.

Held: That where the official receiver reports to the Court under section 121 of the Bankruptcy Act, 1883, that the property of a debtor is not likely to exceed in value 300*l.*, such report is *prima facie* to be acted upon, and the Court ought not, at any rate without some definite reason, to refuse to make an order for summary administration.

THIS was an appeal on behalf of the official receiver for Salisbury, against a decision of the Registrar of the County Court refusing to make an order for the summary administration of the estate of the debtor, *F. Horniblow*, under section 121 of the Bankruptcy Act, 1883.

Section 121 provides that "When a petition is presented by or against a debtor, if the Court is satisfied by affidavit or otherwise, or the official receiver reports to the Court that the property of the debtor is not likely to exceed in value three hundred pounds, the Court may make an order that the debtor's estate be administered in a summary manner, and thereupon the provisions of this Act shall be subject to the following modifications:—

- " (1) If the debtor is adjudged bankrupt the official receiver shall be the trustee in the bankruptcy;
 - " (2) There shall be no committee of inspection, but the official receiver may do, with the permission of the Board of Trade, all things which may be done by the trustee with the permission of the committee of inspection;
 - " (3) Such other modifications may be made in the provisions of this Act as may be prescribed by general rules with the view of saving expense and simplifying procedure; but nothing in this section shall permit the modification of the provisions of this Act relating to the examination or discharge of the debtor;
- " Provided that the creditors may at any time, by special resolution, resolve that some person other than the official receiver be appointed trustee in the bankruptcy, and thereupon the bankruptcy

shall proceed as if an order for summary administration had not been made."

On January 19th, 1884, a receiving order was made against the debtor *Horniblow*; and on the 22nd he filed his statement of affairs, showing thereby assets to the amount of 313*l.*

On investigation, however, the official receiver discovered that the book debts could only realize something like half the sum at which they had been valued, while the stock-in-trade of the debtor had also been much over-estimated, and he thereupon reported to the Court that the property of the debtor was not likely to exceed 300*l.*, and asked for an order that the estate might be administered in a summary manner, as provided by section 121 of the Bankruptcy Act.

This order was refused, and from the refusal the official receiver now appealed.

Muir Mackenzie for the official receiver:

The registrar said he had a discretionary power to make or not to make the order, and he refused to do so unless the official receiver would make an affidavit. I submit that it was his duty to make the order, leaving it to the creditors to have the estate otherwise administered if they should see fit. Section 121, subsection (1), provides as one of the modifications of the general provisions of the Act in the case of a summary administration that, "If the debtor is adjudged bankrupt the official receiver shall be the trustee in the bankruptcy." But that is not binding on the creditors, for by the "proviso" to the section it is enacted, "Provided that the creditors may at any time by special resolution resolve that some person other than the official receiver be appointed trustee in the bankruptcy, and thereupon the bankruptcy shall proceed as if an order for summary administration had not been made." So, by Rule 237 of the Bankruptcy Rules, 1883, (1) "As soon as the official receiver receives notice that he has been appointed to the receivership of an estate, he shall furnish the debtor with a copy of instructions for the preparation of his statement of affairs. (2) The official receiver, or some person deputed by him, shall also forthwith hold a personal interview with the debtor for the purpose of investigating his affairs and determining

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whether the estate shall be administered under section 121 of the Act."

The Legislature clearly intended that the official receiver should investigate the statement of affairs, and if the estate is not likely to exceed in value 300*l.*, that he should report to the Court, and it is the duty of the Court to make the order, leaving it to the creditors to say whether they will have it so or not. There is not a discretionary power in the Court. It is the report of the official receiver upon which the Court is to act.

CAVE, J.:

Judgment.

I am satisfied that the report is what is to be acted upon, and I am of opinion that the order should have been made in this case. There appears to be no ground for the refusal. I do not know what may have been the reasons here which led the Court to refuse, but certainly there is no power to compel the official receiver to make an affidavit. In my opinion these reports are *prima facie* to be acted upon as evidence by the Court. Notwithstanding the refusal of the County Court, therefore, there must be an order that the estate be administered in a summary manner.

WILLS, J.:

I am of the same opinion. It certainly would not be desirable, in any case, to limit the discretion of the Court, and section 121 seems to indicate, I think, that some discretion may be exercised. But here the registrar appears nearly to have refused to exercise any discretion at all. There must, at all events, be some reasonable ground for declining to make the order, and here I can ascertain no reason why it should not have been made.

Order that the estate be administered in a summary manner.

Solicitor : *The Solicitor to the Board of Trade* for the official-receiver.



IN RE TAYLOR, EX PARTE THE OFFICIAL RECEIVER.

DIVISIONAL COURT.

BEFORE
CAVE, J.,
and
WILLS, J.

1885.

March 25.

*Bankruptcy Act, 1883, Section 116, sub-section (2).**Official Receiver acting as Solicitor—Costs.*

Held: That the effect of section 116, sub-section (2) of the Bankruptcy Act, 1883, which provides that no official receiver "shall, during his continuance in office, either directly or indirectly, by himself, his clerk, or partner, act as solicitor in any proceeding in bankruptcy," is not limited to cases of the official receiver acting as solicitor by himself, his clerk or partner, for another person, or on an application for the benefit of the estate, but extends also to cases where the official receiver is acting as solicitor for himself and conducting a case on his own behalf.

THIS was an appeal from the County Court of Yorkshire, holden at Leeds, on behalf of the official receiver for the Leeds district (*John Bowling, Esq.*), against an order of the County Court judge, dated the 18th day of February, 1885, refusing to direct the registrar of the said Court to proceed with the taxation of a certain bill of costs of Messrs. *Bowling & Hirst*, of Leeds, solicitors to the official receiver, in opposing the motion of the trustee (*Mr. James Pickard*), the present respondent, for an order to compel the said official receiver to deliver up the estate of the debtor to the said trustee appointed under a composition arrangement accepted by the creditors and approved by the Court, and against whom the said official receiver claimed to hold possession of the estate pending the payment of the sum or sums which might be found due to the said official receiver for goods supplied for the carrying on of the business of the said estate pending the appointment of the said trustee and paid for by the said official receiver, or for which he was personally liable.

The order made by the County Court judge upon this motion was for the official receiver to deliver up possession of the estate to the trustee on the latter undertaking to pay to or indemnify the said official receiver out of the assets of the estate, in due order of priority, the sums which might be found due to him as aforesaid.

Against this order an appeal took place.

The Divisional Court, before whom the appeal was heard (see Vol. I., p. 264), allowed the appeal by varying the order of the

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County Court judge, and ordering the sum or sums found due to the official receiver to be paid out of the first assets of the estate, and further ordering that "the said trustee do pay to the said official receiver the costs of and incidental to this appeal and of the motion and order in the said County Court, the costs of and incidental to the motion and order in the County Court to be taxed by the registrar of that Court, and the costs of and incidental to this appeal to be taxed by one of the masters of this Court."

The present appeal was with respect to the bill of costs of the motion and order in the County Court delivered for taxation by the official receiver. The bill of costs in question was the "bill of costs of Messrs. *Bowling & Hirst*, solicitors to the official receiver in opposing motion by trustee."

The appointment to tax this bill of costs was made for Friday, the 6th February last. On that occasion the respondent's solicitors attended and took the objection that as the official receiver (Mr. *John Bowling*) was a partner in the firm of Messrs. *Bowling & Hirst*, the solicitors above mentioned, the bill of costs was in its entirety as it then stood for taxation unsustainable, and that it ought not to be taxed.

The grounds of this objection were the terms of section 116, sub-section (2) of the Bankruptcy Act, 1883, which provides as follows:—"No registrar or official receiver or other officer attached to any Court having jurisdiction in bankruptcy, shall during his continuance in office, either directly or indirectly, by himself, his clerk or partner, act as solicitor in any proceeding in bankruptcy . . . and if he does so act he shall be liable to be dismissed from office."

The registrar thereupon declined to proceed with the taxation, pending the further order of the Court, and indorsed the objection upon the bill of costs as follows:—"6th Feb., 1885. Objection having been taken to the taxation of this bill, on the ground that the official receiver cannot act as his own solicitor in this matter, I declined to proceed with the taxation pending the further order of the Court (*Thos. Marshall*, registrar)." The official receiver thereupon gave the respondent's solicitors notice of application to the judge of the Leeds Bankruptcy Court for the 18th February, for an order directing the registrar to tax his costs of

opposing the trustee's motion, and the application was heard before the Court, when the Court made the order now appealed against, refusing to direct the registrar to proceed with the taxation, and ordering the official receiver to pay the costs of the trustee of and incident to the order and application.

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From this decision the official receiver now appealed.

Muir Mackenzie for the official receiver :

Section 116, sub-section (2), does not apply where the official receiver is defending himself from an attack personally. It does, of course, prevent him from acting for another person. The order in the County Court was to deliver up the goods and on refusal to pay costs personally. The official receiver appealed, and was successful in his appeal. Where a solicitor is defending himself he is not only entitled to costs out of pocket, but to the ordinary costs of a solicitor.

[CAVE, J.: If the official receiver had employed a solicitor, such solicitor would have been entitled to his costs. He acted for himself, and the question is: Is he in that case entitled to costs?]

It is clear that section 116, sub-section (2), prevents the official receiver from acting in any proceeding in bankruptcy for another person, and also I think in the case of any application for the benefit of the estate, but it does not affect him where he is conducting a case on his own behalf.

[CAVE, J.: Where do you find in the section anything which shews that the official receiver may act as solicitor for himself, but not for anybody else?]

In the case of the *London Permanent Building Society v. Chorley* (82 W. R. 523), it was held that "where a solicitor a party to an action, appears in person and recovers judgment and costs, he is entitled to tax his costs as solicitor, and not merely as a litigant in person." A solicitor is a representative of others.

Herbert Reed (Hansell with him) for the respondent, Mr. James M.B.—VOL. II.

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Pickard, the trustee under the composition arrangement, were not called on.

CAVE, J.:

I am of opinion that the appeal must be dismissed. The language of the Act is very plain. Section 116, sub-section (2), lays down a rule essential in order to avoid the great mischief which must arise if the official receiver was allowed to act as a solicitor, and have an interest in litigation. The section says distinctly that no official receiver shall during his continuance in office, either directly or indirectly, by himself, his clerk or partner, act as solicitor in any proceeding in bankruptcy. This is a proceeding in bankruptcy. The appellant here is the official receiver. He has conducted a case on his own behalf. If he has done solicitor's work, he might be entitled to solicitor's charges; but to be entitled to these, he must have "acted as a solicitor," which the section forbids. But we are asked to limit the meaning of the section, and to say that its proper interpretation is, that the official receiver may not act as solicitor for a third person, or when an application is made for the benefit of the estate: but that he may do so for himself personally. Now the legislature has not said this, and I shall certainly adhere to the plain language of the Act. No harm can possibly come from it. The official receiver may obtain aid from another solicitor; but I cannot depart from the plain language of the section, and must construe it in its simple meaning, that no official receiver shall, either directly or indirectly, act as solicitor in any proceeding in bankruptcy whatever.

WILLS, J.: I am of the same opinion.

Appeal dismissed with costs.

Solicitors: *The Solicitor to the Board of Trade* for the appellant, the official receiver.

A. Scott Lawson for the respondent.

Case referred to:—

London Permanent Building Society v. Chorley, 32 W. R. 523.

**IN RE JENKINSON, EX PARTE THE NOTTINGHAM AND DIVISIONAL COURT.
NOTTINGHAMSHIRE BANK.**

Bankruptcy Act, 1883, Section 44, subsection (iii.).

Order and Disposition—Trade or business—Deposit of shares with bank.

BEFORE
CAVE, J.,
and
WILLS, J.
1885.

March 25
and
April 1.

In a case where the bankrupt who carried on business as a stockbroker, silversmith, and watchmaker, deposited in the year 1878 the certificates of thirty shares in a wagon company with a bank in order to secure his overdrawn account, but such shares continued to be registered in the name of the bankrupt, and in 1884 a receiving order was made against the bankrupt, whereupon the trustee appointed in the bankruptcy laid claim to the said thirty shares, and the County Court judge decided that the said shares were in the order and disposition of the bankrupt in his trade or business at the time of the bankruptcy, and directed the bank to hand them over to such trustee.

Held: That the shares in question were not in the bankrupt's possession in his trade or business : that they had in fact been registered in the name of the bankrupt for six years, and were held by him simply as an investment and not for the purpose of selling to his customers : and that the order of the County Court judge directing the bank to hand over such shares to the trustee in the bankruptcy must be reversed.

THIS was an appeal from an order of the learned Judge of the Lincoln County Court directing that the certificates of 30 shares in the Lincoln Wagon Company should be delivered up to the trustee in the bankruptcy of the debtor *Jenkinson* as coming within section 44—the order and disposition clause—of the Bankruptcy Act, 1883.

In February and October, 1878, the bankrupt *Jenkinson*, who carried on business as a stockbroker, silversmith and watchmaker, deposited the certificates of the 30 shares in question with the appellants—the Nottingham Bank—to secure his overdrawn account.

These shares, however, were not transferred into the name of the bank, but continued to be registered in the name of *Jenkinson* only.

On February 2nd, 1884, a receiving order was made against *Jenkinson*, and adjudication followed.

The County Court Judge held that the shares in question were in the order and disposition of the bankrupt in his trade or business

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at the time of the bankruptcy, and directed them to be delivered up to the trustee.

From this order the Nottingham Bank now appealed.

Yate Lee (Bigham, Q.C., with him) for the Bank:

Section 44, sub-section (iii.), of the Bankruptcy Act, 1883, provides that the property of a bankrupt divisible amongst his creditors shall comprise "All goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, &c." In that section the words "*in his trade or business*" are substituted for the words "*being a trader,*" which were used in the Act of 1869. These shares were clearly not in the bankrupt's possession in his trade or business. He was a stockbroker, a watchmaker, and a silversmith. For six years, from 1878 to 1884, these certificates lay with the bank as security for the advance made. If a stockbroker, whose business is to deal for other persons, has shares which he holds for six years, they certainly cannot be said to be in his trade or business. He was allottee of certain of these shares, and in 1878 he bought the rest, which he handed to the bank and put them altogether out of his business.

Horton Smith, Q.C. (Stanger with him) for the trustee:

The deposit was made by the bankrupt to secure his overdrawn account. There was only one account, as appears by the affidavit of the bank manager. That was the trade account. Jenkinson bought these shares in his trade and business, and they were deposited to secure his trade account. There is really no difference between the Bankruptcy Act of 1883 and that of 1869. In the case of *The Colonial Bank v. Whinney* (51 L. T. 354), Vice-Chancellor BACON, after quoting section 15 of the Act of 1869 and section 44, sub-section (iii), of the present Act of 1883, said: "Why those words are expressed in a somewhat different way from those of the former Act of Parliament I do not know. The meaning is precisely the same. The debts due to him 'as a trader' and the debts due to him 'in the course of his trade or business' are identically the same, and no conjuration can make any differ-

ence between them, nor do I think that there is the slightest substantial difference between the Act of 1869 and this Act of 1883." The language of the two enactments of 1883 and 1869 is substantially the same. These shares were deposited with the bank to secure the banking account; they were deposited to get an advance for the purposes of his business: and they became from that moment in his order and disposition in his trade or business.

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Bigham, Q.C., in reply:

Notwithstanding the dictum assigned to Vice-Chancellor BACON in the case of *The Colonial Bank v. Whinney*, the Act of 1883 does mean something different to that of 1869. It is not sufficient that a man should be a trader, but the goods must be in his possession in his trade or business, that is, held by him for the purposes of his trade or business. According to the argument put forward on the other side, if a man obtained money on his wife's jewels and used that money in his business, the jewels would be in his trade or business. The argument, in fact, says that pictures, horses, carriages, anything that a grocer, for example, might own, would be in his trade and business, if he got an advance upon it and applied it to the use of his trade or business. Moreover, there is no evidence in this case that the bankrupt did use this in his trade or business.

CAVE, J. :

We will consider what our decision shall be.

April 1st.

The written judgment of the Court was delivered as follows:— Judgment.

This is an appeal from an order of the Judge of the County Court at Lincoln whereby it was ordered that the certificates of thirty shares in the Lincoln Wagon Co., in the possession of the appellants should be delivered to the trustees of the bankrupt.

In February and October, 1878, Jenkinson deposited the certificates of these shares with the appellants to secure his overdrawn account. Notwithstanding the deposit the shares continued to be registered in the name of Jenkinson only. On the 2nd of January, 1884, a re-

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1885. ceiving order was made against *Jenkinson*, and he was afterwards adjudicated bankrupt. He had up to the time of his bankruptcy carried on business as a stockbroker, silversmith, and watchmaker; and the order appealed from was made on the ground that the certificates were in the order and disposition of the bankrupt in his trade or business.

The reputed ownership clause (section 15) of the Act of 1869, embraced all goods in the possession, order, or disposition of the bankrupt *being a trader*. The clause of the present Act (section 44) is confined to all goods in the possession, order, or disposition, of the bankrupt *in his trade or business*. It was contended that the language of these enactments is substantially the same, and in support of that argument the language of Vice-Chancellor BACON, in the *The Colonial Bank v. Whinney* (51 L. T. N. S. 354) was referred to. In that case the Vice-Chancellor is made to say that debts due to a man "as a trader," and debts due to him "in the course of his trade or business," are identically the same expressions. But it is hardly possible that he can have been correctly reported; for in both Acts the words of the proviso are the same, and the expression debts due to a man "as a trader" are not to be found in either section. The expression, goods "in the possession of a bankrupt being a trader," and goods "in the possession of a bankrupt in his trade or business," can hardly be regarded as identical. If a wine merchant carrying on business in the City, lives, say, at Surbiton, the furniture in his house at Surbiton may be said to be in his possession being a trader, but it cannot be said, we think, that it is in his possession in his trade or business. So if a silk mercer in St. Paul's Churchyard were to keep a yacht for his amusement, it could hardly be said that it was in his possession in his trade as a silk mercer. We prefer to follow the language of Vice-Chancellor BACON, in *In re Pryce, Ex parte Rensburg* (L. R. 4 Ch. Div. 685). In that case the bankrupt, a merchant in Liverpool, had deposited with his stockbroker a debenture in a mining company as a security for a debt he owed to the broker, and it was argued that because the bankrupt was a trader the debenture (which was admitted to be a chose in action) was a debt due to him in the course of his trade. Speaking of that argument the Vice-Chancellor said: "I am unable to follow it. The result of it would be that

every investment made by a man engaged in trade would be a debt due to him in the course of his trade. The investment has nothing whatever to do with the bankrupt's trade. The transaction was a plain and ordinary one about which there can be no doubt whatever that it was an investment made by lending the money to a company." If a debenture in a mining company in which a trader has invested his money, being a chose in action, is not a debt due to the trader in the course of his trade or business, it would seem to follow that a share in a wagon company in which a trader has invested his money, being a chose in possession, is not in his possession in his trade or business. It was further argued that however this might be, if the bankrupt had not mortgaged the shares at all, or had deposited them to secure a private debt, yet that as he deposited them with his bankers to secure his banking account, they became from that moment in his order and disposition in his trade or business. It was somewhat difficult to follow the argument; but it was to the following effect: The bankrupt wanted an advance for the purposes of his business and he got an advance by depositing these shares with the bankers. The advance was used in his business and these shares represented the advance, and therefore the shares were used in the business also. When this somewhat confused argument comes to be examined it falls to pieces directly. The bankrupt had the shares and parted with them to secure the advance, therefore so far as he was concerned the money advanced which he got, represented the shares he parted with, and conversely to the banker, the shares which he got from the bankrupt represented the money he had advanced to him; but why because the bankrupt got money on the security of his shares to use in his business, therefore the shares which he parted with to get the money which he wanted to use in his business were themselves in his order and disposition in his business, passes comprehension. Let us take again the case of the silk mercer who has a yacht for purposes of pleasure, if he mortgages the yacht to secure his banking account, but continues to sail about in it for his pleasure, does the yacht cease to be in his possession for purposes of pleasure, and begin to be in his possession in his trade? The very question of reputed ownership cannot arise so long as it is in his possession unmortgaged. When the yacht is mortgaged for a private debt the

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reputation cannot arise. But it is said that the moment he mortgages it to secure his trade account with his bankers, this reputation of ownership arises, and arises, be it remembered, among people who are utterly ignorant of the mortgage, for if they knew of the mortgage which is said to give rise to the reputation of ownership, it is clear that that reputation could never arise. If this argument is good for anything, the decision in *In re Pryce, Ex parte Rensburg* (L. R. 4 Ch. Div. 685), should have been the contrary way.

Lastly, it was said that there is a well-known custom on the London Stock Exchange by which London brokers are compelled themselves to take up stock they have bought for their customers if the customer fails to find the money on the appointed day, and that in that case it is a very common thing for the broker to deposit the shares so taken up with his bankers to secure an advance, and to redeem them again when the customer finds the money. Whatever may be the law as to shares so acquired and dealt with, the facts of this case are entirely inconsistent with the argument. It has first to be made out as a fact that the shares were in the bankrupt's possession in his trade or business, before the question of reputed ownership arises. In this case the shares had in fact been registered in his name for six years, and were held by him simply as an investment and not for the purpose of selling to his customers. The further question, therefore, whether the shares were in the bankrupt's reputed ownership does not arise, for the necessary preliminary fact that they were in his possession, in his trade or business, does not exist.

In our judgment the order appealed from was wrong, and the appeal must be allowed, and the order set aside with costs here and below. The trustee may recoup himself out of the estate.

Appeal allowed with costs.

Solicitors: *Watson* for the appellant.
 for the respondents.

Cases referred to or relied upon:—

Colonial Bank v. Whinney, 51 L. T. 354.

In re Pryce, Ex parte Rensburg, L. R. 4 Ch. Div. 685.

IN RE SALMON & WOODS, EX PARTE GOULD.

DIVISIONAL COURT.

*Bankruptcy Act, 1883, Section 44, subsection (iii.): Merchant Shipping Act, 1854, Section 72.*BEFORE
CAVE, J.,
and
WILLS, J.
1885.*Mortgage of fishing boats—Nets—"Appurtenances."*

April 15.

In a case where certain fishing boats had been mortgaged by the bankrupts, and the mortgagees laid claim to the nets and fishing gear which had been used on board the said vessels (but of which no particular nets were appropriated to or specially belonging to any particular vessel) on the ground that such nets and fishing gear came within the word "ship" in section 72, and the word "appurtenances" in the form of mortgage of a ship now in use and substituted for Form I. given in the Merchant Shipping Act, 1854.

Held: That in order to make a thing an appurtenance it must be specified: that in the present case there was no evidence to show that any specific nets were appropriated to any particular ship, but that they were used indiscriminately: and that they could not in consequence be considered "appurtenances" within the meaning of the Act.

THIS was an appeal on behalf of the trustee in the bankruptcy of Messrs. *Salmon & Woods* from an order of the learned judge of the County Court at Great Yarmouth, declaring that certain nets and fishing gear used by the bankrupts on board certain fishing vessels were comprised in certain mortgages of the said vessels.

The order appealed from was dated February 14th, 1885, and declared that "on application being made on behalf of Mr. *De Caux* and Messrs. *Mack & Mack* this Court is of opinion that the nets, &c., and fishing gear now in the possession of the trustee in the bankruptcy and used on board of the vessels are comprised in the mortgages aforesaid, and that the said mortgages are not a fraudulent preference; and it is ordered that the trustee do forthwith deliver up the said nets, &c., and fishing gear to the said applicants."

From the facts it appeared that, in the year 1862, Messrs. *Salmon & H. N. Woods* carried on business in partnership as fishing boat owners, and were the registered owners of the boat named the "George & Charles." In June, 1862, this boat was mortgaged to Messrs. *Mack & Mack*.

In 1864 Messrs. *Salmon & H. N. Woods* became the owners of

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the "Henry & Emma," which, on May 31st, 1864, they also mortgaged to Messrs. *Mack & Mack*.

In 1865 the mortgage of the "George & Charles" was discharged.

In January, 1868, *H. N. Woods* died, and by his will appointed his wife, *Esther Woods*, and his son, *Henry R. Woods*, his executors, and devised to them his shares in the vessels in question.

A new partnership was thereupon entered into between *Salmon* and *Esther & Henry R. Woods*, in which the two vessels were used, and in 1882 a further vessel, the "Four Brothers," was acquired.

On May 20th, 1882, the "Four Brothers," and on December 16th, 1884, the "George & Charles," was mortgaged to Mr. *De Caux*.

Messrs. *Salmon & Woods* subsequently became bankrupt, and the nets and fishing gear which had been used generally in the said vessels were claimed by Messrs. *De Caux* and *Mack & Mack* under the mortgages in question.

From the decision of the County Court judge in favour of the said mortgagees the trustee in the bankruptcy now appealed.

Winslow, Q.C. (J. Linklater with him) for the trustee :

After dealing with other points in support of the appeal, and reading affidavits, said :

. . . Then were the nets ever "appurtenances" within the Merchant Shipping Act? The sections of the Merchant Shipping Act (17 & 18 Vict. c. 104) which deal with mortgages are sections 66—75. The mortgage is to be in the form authorised by the Board of Trade. And by section 72 "No registered mortgage of any ship or of any share therein shall be affected by any act of bankruptcy committed by the mortgagor after the date of the record of such mortgage, notwithstanding such mortgagor at the time of his becoming bankrupt may have in his possession and disposition and be reputed owner of such ship or share thereof; and such mortgage shall be preferred to any right, claim, or interest in such ship or any share thereof which may belong to the assignees of such bankrupt." The Act provides that a registered ship shall

not be subject to reputed ownership. Section 4 of the Bills of Sale Act, 1878, also expressly provides that an assignment of a share of a ship does not require registration as a bill of sale. The question arises whether fishing nets fall under what may be included as "appurtenances" to a ship or vessel. The form of mortgage authorised by the Board of Trade, and which is now substituted for the Form I. originally given in the schedule to the Merchant Shipping Act, runs as follows "and for better securing to the said —— the repayment in manner aforesaid of the said principal sum and interest, I hereby mortgage to the said ——, —— shares of which I am the owner in the ship above particularly described, and in her boats, guns, ammunition, small arms and appurtenances." Now were the nets ever appurtenances within the Act? Nets *qua* nets would require registration as a bill of sale, and if left in the order and disposition of the bankrupt as these clearly were, would pass accordingly. These nets are no part of a ship and are not necessarily protected. These were not even special nets for special vessels, but they were used indiscriminately. The evidence clearly shows that there was no appropriation whatever of special nets to any special boats.

E. Cooper Willis, Q.C., for Mr. de Caux was proceeding to deal with the other points :

[*Cave, J.* : What we should like to hear you on is as to the nets being appurtenances.]

As to that question, the word "ship" and the words "ship and appurtenances," are convertible terms. In the case of the "*Dundee*" (1 Hagg. Ad. Rep. 109), it was held that "the fishing stores of a vessel engaged in the Greenland fisheries were liable to contribute in compensation for damage done to another British ship, such stores being considered appurtenances within the meaning of the 58 Geo. 3, c. 159, notwithstanding that the first clause of the Act mentions only ship and freight." Also in the case of *Gale v. Lawrie* (5 B. & C. 156), it was held that "the 53 Geo. 3, c. 159, s. 1, is to be construed as if the words 'with all her appurtenances' had been inserted after 'ship or vessel' as in

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section 7. Whatever is on board a ship for the object of the voyage and adventure in which she is engaged belonging to the owner constitutes a part of the ship and her appurtenances within the meaning of the 53 Geo. 3, c. 159, and the owner is liable to the extent of the value thereof for damage done to another vessel in the manner described by that Act." Whatever is necessary for the ship is an "appurtenance." These vessels were built specially for fishing and would be perfectly useless without the nets.

[CAVE, J.: Suppose a vessel was let out on hire for the season of 1885, would any particular nets be naturally let out with her?]

Prima facie if a fishing boat is let out I presume the nets would be let out.

[CAVE, J.: There must be a right to take certain definite nets.]

Poyser for Messrs. Mack & Mack:

I wish also to adopt all that has been said in argument by Mr. Willis, and also the cases quoted by him. I say further that my title is on the registry of shipping. I am there as mortgagee of the ship and its appurtenances. It is impossible to go behind that. The object of the registry of shipping is that there shall be there open to hand the condition in which the ship is. If a ship changes its character, the new appurtenances which take the place of the old are serviceable for the purpose of the section.

CAVE, J.:

Judgment.

I am of opinion that the order of the County Court cannot be supported. The point on which my judgment is founded is this, that it has not been made out that any of these nets were appurtenances to any of these ships. I do not attempt to lay down any general principles. I simply say that there is no evidence in this case that any nets were appropriated to any particular ships. There is evidence to the contrary. In order to make a thing an appurtenance you must specify it. It is not sufficient to say that the ships were furnished generally from a mass of nets. Here the nets were not appropriated to any vessel but were used indis-

criminally. It is impossible to pick out any nets and say that they were used exclusively by any particular vessel. It was pure accident after the nets were taken out of one of these ships at the end of the season whether in the next season they were used on board the same ship. The case of the "*Dundee*" (1 Hagg. Ad. Rep. 109), which has been quoted, is distinguishable. The question there was the liability of a shipowner for damage done by his ship. It was easy to say that certain specific nets were used in the voyage and were the appurtenances of the ship. It is not necessary now to consider whether, if it could be shewn that there were things specially appropriated to any one of these ships, the mere fact that they were changed in character from time to time would affect the matter. In this case no specific nets were ever appropriated to any particular ship. They were used sometimes on one ship and sometimes on another. I have come to the clear conclusion that the mortgagees have altogether failed to make out that these were appurtenances, and the order of the County Court must be set aside. It is not necessary to go into the other points raised. I rest my decision simply on the fact that these nets were not appurtenances, the evidence being entirely to the contrary.

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WILLS, J. :

I am of the same opinion. The question is whether these nets are included under the word ship in section 72 of the Merchant Shipping Act. *Prima facie* they would not be so included. But it has been argued that "ship" is equivalent to "ship and its appurtenances," and to a certain extent that is doubtless so. It would include spare sails, duplicate anchors, anything in fact which it would not be prudent to send a ship to sea without. But the fact that the word "appurtenances" is contained in the substituted form for Form I. cannot extend the meaning of the word ship in section 72 of the Act. This case is not covered by authority, but it is clear to me that these nets are not appurtenances in the sense that they can be termed "appurtenances" in accordance with section 72. I entirely agree with what my brother CAVE has said.

Appeal allowed with costs.

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Solicitors: *Linklaters* for *C. H. Wiltshire*, Yarmouth, for the trustee.

Dubois, Reed & Williams for *Diver & Preston*, Yarmouth, for the mortgagees.

Cases relied upon or referred to :—

The "Dundee," 1 Hagg. Ad. Rep. 109.

Gale v. Lawrie, 5 B. & C. 156



PRACTICE.

COURT OF
 APPEAL.

BEFORE THE
 MASTER OF
 THE ROLLS,
 BAGGALLAY,
 L.J.,
 BOWEN, L.J.
 1885.
 April 24.

IN RE HOLLAND, EX PARTE WARREN.

Bankruptcy Act, 1883, Section 46, subsection (2) and Section 168.

Execution and sale—Notice of bankruptcy petition—Sheriff—Officer charged with the execution of a writ or other process.

Held: (1.) That the notice to the sheriff mentioned in Section 46, subsection (2) of the Bankruptcy Act, 1883, must be given either to the sheriff himself, or to some recognised agent of his for the purpose of receiving such notice, such as the under-sheriff or some authorised person at the sheriff's office, and that such notice given to an ordinary bailiff or man in possession is not sufficient.

(2.) That the term "officer charged with the execution of a writ or other process" included in the term "sheriff" by Section 168 of the Bankruptcy Act, 1883, signifies an officer charged with duties similar to those of a sheriff though he is not called sheriff, as, for example, the bailiff of a County Court.

(3.) In an action in the Mayor's Court the notice should be given at the office of the Serjeant-at-Mace, either to him or to his representative.

THIS was an appeal against an order of Mr. Justice CAVE, whereby he had directed that the sum of £104 12s. 6d. in the hands of one *C. Fitch*, the serjeant-at-mace of the Lord Mayor's Court, should be paid over to the trustee in the bankruptcy of *A. Holland* under the following circumstances :—

In October, 1884, a judgment for the amount of £104 12s. 6d. was recovered in the Mayor's Court against the debtor *Holland* by *Warren*, the appellant in the present case ; and on the 18th of

that month, a warrant was lodged with *C. Fitch*, the serjeant-at-mace of the Mayor's Court, directing him to levy for this amount on the goods of the debtor.

On proceeding to carry out these instructions, however, *Fitch* discovered that *Hillier*, an officer of the Sheriff of London, was already in possession of the debtor's premises under several writs of execution issued out of the Queen's Bench Division of the High Court of Justice by various creditors.

According to the general custom in such cases, *Fitch* thereupon handed over to *Hillier* his warrant, and entrusted the execution to him.

On October 29th, the sale of the goods of the debtor was held by *Hillier*, and on the next day, October 30th, he handed over to *Fitch* the sum of £104 12s. 6d. as the amount of his writ. The rest of the proceeds he kept in his own hands as required by section 46, sub-section (2) of the Bankruptcy Act, 1883, which provides that "Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding twenty pounds, the sheriff shall deduct the costs of the execution from the proceeds of sale, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him."

Within the prescribed time, viz., on October 31st, *Hillier* was served with notice of a bankruptcy petition having been presented against *Holland*, on which adjudication followed, and he accordingly handed over all moneys remaining in his own hands, after deducting the costs of the execution, to the trustee in the bankruptcy, but he did not communicate the notice to the serjeant-at-mace, and the serjeant-at-mace had no notice of any bankruptcy petition within fourteen days after the sale.

On March 5th last, however, application was made on behalf of the trustee to Mr. Justice *Cave*, that *Fitch* might be ordered to

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pay over in like manner the £104 12s. 6d. which he had received.

This application was granted on the ground that the word "sheriff" in section 46, sub-section (2), of the Bankruptcy Act, 1883, by virtue of section 168—the interpretation clause of the same Act—included "any officer charged with the execution of a writ or other process," and that the sheriff, who was to be taken to mean *Hillier*, did receive notice of the petition.

From this decision *Warren*, the execution creditor, now appealed.

E. Cooper Willis, Q.C., for Mr. Warren, the execution creditor:

Even if the notice to *Hillier* was sufficient, the notice to *Hillier* was not a notice to *Fitch*. *Fitch* was the officer charged with the execution of the warrant. He entrusted *Hillier* with the sale, and thereby *Hillier* became the agent of *Fitch*. But that temporary agency ceased as soon as the proceeds of the sale were paid over. Notice to *Hillier* cannot be held to be notice to *Fitch*; and as the latter had no notice of the bankruptcy petition, the execution creditor is clearly entitled to retain the money.

Ringwood (Sidney Woolf with him) for the trustee.

By section 168 of the Bankruptcy Act, 1883, the term "sheriff" is defined as follows:—"Sheriff includes any officer charged with the execution of a writ or other process." The notice to *Hillier*, therefore, was quite sufficient.

Then section 46, sub-section (2), expressly states that the sheriff is to retain the proceeds of a sale for fourteen days, and if within that time he receives notice of a bankruptcy petition, he must after deducting the costs of the execution, pay the balance to the trustee. The analogous section in the Act of 1869, was section 87, and under that Act I do not think there would have been any doubt but that *Fitch* was bound to act in the same manner as *Hillier*. (Counsel referred to *In re Rogers, Ex parte Villars*, L. R. 9 Ch. App. 432; 43 L. J. Bank. 76; 30 L. T. N. S. 348.)

THE MASTER OF THE ROLLS (BRETT):

Judgment. The difficulty in the present case has arisen entirely from the

fact that this statute which we have to construe is drawn in what I may call the modern form. The Act of 1869 was drawn in the old form, and section 87 of the Act of 1869 provided that "Where the goods of any trader have been taken in execution . . . the sheriff, or in the case of a sale under the direction of the County Court, the high bailiff or other officer of the County Court, shall retain, &c." That is the way they drew statutes in those days; but now, in the new Act, we have simply "the sheriff." Section 46 of the Act of 1883, says, the notice is to be given to the sheriff. If that had remained alone, an officer carrying on the same duties as a sheriff, but not called so, would have been excluded: as, for example, the bailiff of a County Court, or the serjeant-at-mace of the Mayor's Court. In order to include those persons who have similar duties to those of a sheriff, in modern drafting there is what is called an interpretation clause, and in this Act it is to this effect, that the term "sheriff includes any officer charged with the execution of a writ or other process." Now that means persons charged with the execution of a writ in the same manner as a sheriff is charged with an execution in the High Court. The effect of it is to include the serjeant-at-mace of the Mayor's Court in section 46, and therefore the notice in question must be given to him in the same way as such a notice ought to be given to a sheriff. It does not mean every bailiff to whom a writ is given. I am of opinion that in the case of a sheriff, if the notice is only given to the man in possession, it will not do. It ought to be given at the sheriff's office, or to the under-sheriff, that is, either to the sheriff himself, or to some recognised agent of his for the purpose of receiving such notices. It will not do to give the notice to an ordinary bailiff or man in possession. So in this case the notice ought to have been given to the serjeant-at-mace, or to his recognised officer for the purpose of receiving such notices. *Hillier* was made a deputy of the serjeant-at-mace to do certain things, he was the agent of the serjeant-at-mace to do part only of his duty, viz., to levy, sell, and hand over the money. It was not sufficient to give notice to him. But more than that, when *Hillier* had done the things for which he was made agent, and had handed over the money, the agency certainly terminated, so that looking at the case in any way the proper notice was not given. The appeal must therefore be allowed.

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I am of the same opinion. The question which has been raised, is really this. To whom ought this notice to be given? The only name mentioned in section 46, sub-section (2), is that of "sheriff."

The real meaning of the term "sheriff," is to be ascertained from section 168, which provides that the term "sheriff includes any officer charged with the execution of a writ or other process." But I cannot construe section 168 as referring to any person to whom the person originally charged with the execution of a writ of execution may think fit to depute the discharge of a part of his duties. I am of opinion that it refers to a person lawfully charged with the execution of duties similar to those of a sheriff.

BOWEN, L.J. : I am of the same opinion.

Appeal allowed with costs here and below.

Solicitors : *D. Blelloch* for the execution creditor.

Davidson & Morriss for the trustee.

Case referred to :—

In re Rogers, Ex parte Villars, L. R. 9 Ch. App. 432 ; 43 L. J. Bank. 76 ; 30 L. T. 348.

IN RE BARNETT, EX PARTE REYNOLDS AND CO.

Bankruptcy Act, 1883, Sections 100 and 102.

Jurisdiction of County Court in Bankruptcy—Powers of County Court to restrain action in High Court.

Held: That by the provisions of Sections 100 and 102 of the Bankruptcy Act, 1883, which give to a County Court "for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the court all the powers and jurisdiction of the High Court," and also "full power to decide all questions of priorities, and all other questions whatsoever whether of law or fact which may arise in any case of bankruptcy," a County Court has no jurisdiction or power to restrain an action in the High Court brought against the trustee of a debtor adjudicated bankrupt in such County Court.

COURT OF APPEAL.

BEFORE THE MASTER OF THE ROLLS,
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THIS was an appeal from a decision of the Divisional Court in Bankruptcy allowing an appeal on behalf of the trustee in the bankruptcy of the debtor *Barnett* from an order of the learned Judge of the County Court at Croydon, by which order the Judge of the said County Court had refused to stay proceedings in an action brought by Messrs. *F. W. Reynolds & Co.* in the Queen's Bench Division of the High Court of Justice against such trustee for the recovery of certain machinery, or to determine a question which had arisen between Messrs. *Reynolds & Co.* and the trustee as to the ownership of the said machinery.

The facts of the case were as follows:—

In October, 1884, the debtor *Barnett*, who had carried on business as a builder at Shortlands, was adjudicated bankrupt, and on November 4th one *E. Foreman* was appointed trustee.

At the time of his bankruptcy *Barnett* had in his possession certain mortar-making machinery which he used in his business, and which he had obtained from Messrs. *Reynolds & Co.* under an agreement dated April 11th, 1884, on what is known as the "Purchase-hire system." According to this agreement the bankrupt was to pay the purchase-money of the machinery, amounting to 473*l. 5s.*, by instalments.

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When the bankruptcy took place, however, a sum of 200*l.* had only been paid, and on the appointment of the trustee Messrs. *Reynolds & Co.* laid claim to the machinery in question.

Some negotiations ensued and on November 29th the firm of solicitors employed by Messrs. *Reynolds & Co.* wrote to the trustee that as no settlement had been made they were instructed to take legal proceedings unless the matter was arranged before one o'clock on the following Monday, December 1st.

On that day the solicitor to the trustee called on the solicitors to Messrs. *Reynolds & Co.*, and informed them that the trustee would at once apply to the Court of Bankruptcy to decide as to the ownership of the machinery in question, which such trustee claimed as having been in the order and disposition of the bankrupt at the time of his bankruptcy.

On December 2nd Messrs. *Reynolds & Co.* issued a writ against the trustee, by which they claimed a return of the machinery or 478*l.* 5*s.*, its value, and 200*l.* for detention, and a statement of claim was subsequently delivered.

On January 6th the trustee delivered short notice of motion for an order in the County Court staying these proceedings, and praying that the ownership of the machinery in question might be there decided.

- This application, however, was refused by the County Court Judge, but on an appeal being made on behalf of the trustee to the Divisional Court in Bankruptcy on March 24th last, the order of the County Court was set aside and the appeal allowed.

In delivering the written judgment of the Divisional Court on April 1st, CAVE, J., after referring to the facts of the case, said :

"In order to understand the point, it is necessary to consider the old law. Section 72 of the Act of 1869 was as follows [*His Lordship read the section*]. Questions soon arose as to the extent of the jurisdiction given by this section, and ultimately the general principle was laid down, that where a trustee claimed only the same right as the bankrupt himself would have had, the Court of Bankruptcy ought not to assume jurisdiction, but ought to leave the matter to be dealt with by the ordinary tribunals (*Ellis v. Silber*, L. R. 8 Ch. App. 83; 42 L. J. Ch. 666; 28 L. T. 150);

but that where, by the operation of the law of bankruptcy, the trustee had a higher and a better title than the bankrupt, the Court of Bankruptcy ought to decide the matter itself (*Ex parte Brown*, *In re Yates*, L. R. 11 Ch. Div. 148; 48 L. J. Bank. 78; 40 L. T. N. S. 53). This rule, however, was not an inflexible one, and did not preclude the Court from exercising a discretion not to assume the trial of the case. Thus, where considerable property was at stake, and questions seriously affecting character were involved, it was held that the case ought to be tried in the High Court and not in the County Court (*Ex parte Armitage*, *In re Learoyd & Co.*, L. R. 17 Ch. Div. 18; *Ex parte Price*, *In re Roberts*, L. R. 21 Ch. Div. 553; 52 L. J. Ch. 131). This was the state of the law when the Act of 1869 was repealed and the Act of 1883 came into operation. The first clause of section 102 of the later Act is the same as that part of section 72 of the earlier Act, which I have already read, but section 102 also contains this very material proviso: 'Provided that the jurisdiction hereby given shall not be exercised by the County Court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding assent thereto, or the money, money's worth, or right in dispute does not, in the opinion of the judge, exceed in value two hundred pounds.' Now it seems to us that the proviso is intended to enforce the jurisdiction of the Court of Bankruptcy, and even to extend it to cases where it had been excluded by previous decisions. The proviso does not extend to claims "arising out of the bankruptcy," that is, as we understand it, to cases where by the operation of the law of bankruptcy the trustee has a higher and better title than the bankrupts, and these cases consequently are governed by the general rule laid down in *Ex parte Brown*. It does extend to other cases arising in the bankruptcy, including cases where the trustee claims only the same right as the bankrupt would have had, and as to these cases it lays down the new principle that the Court is to exercise jurisdiction where the parties consent, or where the amount in dispute does not exceed 200*l*. The present case is one of those in which the trustee, by the operation of the law of bankruptcy, had a higher and better title than the bankrupt, and we

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agree therefore with his Honour that the Court had jurisdiction, although the parties did not consent, and the value of the subject-matter exceeds 200*l.*, and the only question is, whether the case falls within the exceptions to the general rule recognised in *Ex parte Armitage* and in *Ex parte Price*. No questions of character are involved, and the amount in dispute is in itself comparatively unimportant, but it is alleged as a ground of the Court's refusal to exercise jurisdiction that the trustee was guilty of delay in taking proceedings, that the claim might be more expeditiously disposed of by allowing the action to proceed, that the question is one of importance to *Reynolds & Co.*, who have machinery to the value of 30,000*l.* or 40,000*l.* on hire, and that they wanted the case tried by a jury. There seems no ground for the imputation of delay; the decision in this case will not govern others necessarily, and the last ground appears to have been dropped, and the case set down for trial without a jury. After a careful consideration of these grounds we are of opinion that this case falls within the general rule and not within the exception. Therefore the case must be remitted to the County Court judge for hearing. This disposes of the substantial question in the case, but a subsidiary, though important, question remains; viz., whether the trustee is entitled to an order restraining *Reynolds & Co.* from continuing proceedings in the action. Mr. *Poyser* contended that the County Court as a Court of Bankruptcy has no jurisdiction at present to restrain an action in the High Court. That jurisdiction, it is argued, was conferred under the Act of 1869 by section 66 of that Act, which gave the County Court all the jurisdiction of the Court of Chancery, while section 100 of the present Act gives the County Court all the jurisdiction of the High Court, which powers do not include the power to restrain an action in the High Court, seeing that by the Judicature Act, 1873, sect. 24, no cause or proceeding in the High Court is to be restrained by prohibition or injunction. We think, however, that the power of the Court of Bankruptcy to restrain actions was not conferred by section 66 of the Act of 1869. The Court of Bankruptcy appears always to have exercised a jurisdiction analogous to that of the Courts of Equity by way of injunction. Thus, in *Ex parte Figes* (1 Glyn & J. 122), the Court, on an *ex parte* application on behalf

of the bankrupt, restrained the assignees from selling the property until further order. So, in *Ex parte Harding* (1 Buck. 24), the Court granted an injunction to restrain the negotiation of a promissory note. Again, in *Ex parte Leigh* (2 Glyn & J. 392), the Court restrained the bankrupt from proceeding in an action at law which he had commenced to test the validity of the commission. The powers of the Court over parties other than the bankrupt and his creditors were much extended by section 72 of the Act of 1869, and in 1871 it was decided by the Court of Appeal, in *Ex parte Cohen* (L. R. 7 Ch. App. 20; 40 L. J. Bank. 14; 25 L. T. 478), that in cases to which that section was intended to apply, the Court of Bankruptcy had power to restrain actions. That decision was followed by many others in which injunctions were granted, such as *Morley v. White* (L. R. 8 Ch. App. 214; 42 L. J. Ch. 880; 27 L. T. 736); *Ex parte Gordon* (L. R. 8 Ch. App. 555; 42 L. J. Bank. 42; 28 L. T. 242); *In re Thorpe* (L. R. 8 Ch. App. 743; 42 L. J. Bank. 34); and in none of them is the jurisdiction treated as depending on section 66 of the Act, but rather as an exercise of the ordinary powers of the Court brought into play by section 72. In *Ex parte Ditton*, *In re Woods* (L. R., 1 Ch. Div. 557; 45 L. J. Bank. 87; 37 L. T. 109), it was contended that by virtue of section 24 of the Judicature Act of 1873, the Court of Bankruptcy had lost the power to restrain actions in the High Court by injunction, but it was held that there was no doubt whatever that the jurisdiction of the Court of Bankruptcy to restrain proceedings in other Courts still existed, that there was nothing in the Judicature Acts which interfered with the jurisdiction of the Court of Bankruptcy as it existed before those Acts, and that section of the Act of 1873 only provided rules for the manner in which the High Court of Justice should carry on its proceedings. Section 100 of the Act of 1883 provides that 'a County Court shall, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the Court, have all the powers and jurisdiction of the High Court,' and the ordinary powers of the Court which are here preserved appear to us to include the power of restraining actions which the Court of Bankruptcy seems always to have exercised, and which, in some form or another, is absolutely necessary to its existence as an effective Court. It was

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urged that the observations of Lord Justice MELLISH, in *Ex parte Dittion*, as to the effect of section 3 of the Judicature Act of 1873, are equally cogent as to the effect of section 93 of the Bankruptcy Act of 1883. The Lord Justice there expressed an opinion that if the alterations made by the 9th section of the Judicature Act of 1875 had not been made, and, if consequently the London Court of Bankruptcy had been united and consolidated with the High Court, the County Courts acting in bankruptcy would still have retained their power of granting injunctions which the London Court of Bankruptcy would not have retained. If, it was argued, the London Court of Bankruptcy has by the effect of section 93 of the Act of 1883 lost the power of granting injunctions, it is anomalous that the County Courts should retain their power. But if the London Court has lost the power of granting injunctions, on which it is not necessary to give an opinion to-day, it has, by the union with the High Court of Justice acquired a power almost equally valuable. As a member of the Queen's Bench Division of the High Court of Justice, the Judge in Bankruptcy has jurisdiction to stay any proceedings in that division, and he would not, we apprehend, hesitate, upon a proper case being made, to direct the trustee to apply for a stay of proceedings in the Chancery Division, should such a step ever become necessary. The case of *Cobbold v. Pryke* (L. R. 4 Ex. D. 315) does not deal with the powers of the County Court as a Court of Bankruptcy, and is distinguishable on that ground. We therefore come to the conclusion that the trustee is entitled to an injunction restraining *Reynolds & Co.* from proceeding with their action until further order, but he must give an unqualified undertaking to be answerable for damages and to proceed with the action in the Court below with due diligence. The trustee must have his costs of this appeal, the costs of the Court below to abide the result of the motion unless the County Court judge otherwise directs."

From this decision Messrs. *Reynolds & Co.* now appealed.

Pollard (Poyser with him), after stating the facts and reading the judgment of the Divisional Court, said :—

The County Court as a Court of bankruptcy has no jurisdiction

to restrain an action in the High Court. The whole jurisdiction to interfere by injunction was conferred by section 66 of the Bankruptcy Act, 1869, which gave the County Court all the jurisdiction of the Court of Chancery. Now, section 100 of the Act of 1883 gives the County Court all the jurisdiction of the High Court, which powers do not include the power to restrain an action in the High Court. By section 93 of the Bankruptcy Act, 1883, the London Court of Bankruptcy has certainly lost the power of granting injunctions, and it is altogether anomalous that the County Courts should retain this power.

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Bigham, Q.C. (Swinfen Eady with him) for the trustee:

Under the Bankruptcy Act, 1869, there was no doubt as to this power, but it was under section 72 of that Act, it was not under section 65 or section 66. The case of *Snow v. Sherwell* (25 W. R. 438) held that "a County Court Judge, in the exercise of his bankruptcy jurisdiction, has power, under section 72 of the Bankruptcy Act, 1869, to grant an injunction restraining an action for foreclosure brought by a mortgagee of the bankrupt, and then pending in the Chancery Division: and it makes no difference that such action has been commenced before the institution of the bankruptcy proceedings."

[THE MASTER OF THE ROLLS: If you look at the case your argument all depends on the head-note, and it is a bad head-note. The head-note is wrong.]

Then section 100 of the Bankruptcy Act, 1883, gives to a County Court all the powers and jurisdiction of the High Court. Section 102 of the Act of 1883 is equivalent to section 72 of the Act of 1869. I submit that section 102, together with section 100, gives the County Court Judge the power to stay an action. It means that a County Court Judge has all the powers of the High Court, taking the High Court as one. It does not say that the County Court Judge is to have the jurisdiction of a Judge of the Queen's Bench Division.

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Judgment.

THE MASTER OF THE ROLLS (BRETT) :

In this case there was a bankruptcy in a County Court. The bankrupt was a builder and had hired certain machinery for the purposes of his business. The person who alleges he is the owner of this machinery brought an action in the Queen's Bench Division against the trustee in the bankruptcy to recover it. To that action the trustee has made answer that admitting such machinery was not the property of the bankrupt, yet it was in his order and disposition. This action had been brought. The County Court Judge finding there was such an action was informed that the matter would depend on the question whether it is so well known by people dealing with builders that they are in the constant habit of hiring machinery, that nobody dealing with a builder ought to assume that such machinery was his own. That question is a most important one to a large business. There is nothing of law in it, but it depends on a considerable knowledge of business. It must be tried first in a particular case ; it must be tried more than once certainly, and after that the Court will take judicial notice of cases of this kind. So they are of great importance. They are usually tried by a judge and jury, by men of business, and the question is decided not by the casual finding of one jury, but of two, or three, or four juries, and is at length adopted by the Court. The present case was in my opinion *the case* which should be tried by a superior tribunal. It is just the case for the trade which ought to be tried by a judge and a jury to have the question settled in a way which the Courts will adopt. The County Court Judge, when motion was made to him, thought it better not to try the question himself, but that it should be tried in a superior tribunal, and he stated that whether he was obliged to do so or not, he would abide by the decision given. Now to my mind that was a most wise determination. But the Divisional Court were of a different opinion, and it seems to me on this principle, that when a Court is seized of a case it should decide everything in connection with it. But the Divisional Court came to a most important decision. It said that the County Court Judge would have had the power to issue an injunction to prevent the action in the High Court being tried, and that he ought

to have done so ; and the Divisional Court, doing what it said the County Court Judge might do, did so. Now on appeal here it has been argued on the one side that the County Court Judge had no power to issue the injunction, and even if he had the power, he, in the exercise of his discretion, refused to accede to the motion of the trustee, and his order ought not to have been set aside by the Divisional Court. On the other hand, it was argued that the County Court Judge has the power, and in this case he ought to have exercised it. Now is it true to say that the County Court Judge has power to issue an injunction to parties in dispute in the High Court not to proceed with an action ? The power of the County Court in bankruptcy is determined by the Bankruptcy Act, 1883. It is not incorporated in other Acts but is contained in the Act of 1883. What is the power of the County Court as to injunction ? The powers of the County Court are contained for this matter in section 100. That section provides that " A County Court shall, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the Court, have all the powers and jurisdiction of the High Court." But it was argued that this power was not given by section 100, but is a necessary implication in section 102, dealing with the general power of Bankruptcy Courts. It was said that section 102 of the Act of 1883 is equivalent to section 72 of the Act of 1869, and it was said that there are cases which show that the power of injunction was derived from section 72. The case of *Snow v. Sherwell* (25 W. R. 483) was quoted to this effect. But the only colour for this statement is the head-note of that case, and the head-note, as I have said, is certainly bad. The power was given by section 66 of the Act of 1869, and that is not in the terms of the present Act. There the powers were " all the powers and jurisdiction of a Judge of Her Majesty's High Court of Chancery." The difference between the Act of 1869 and the Act of 1883 is, that the words are different with regard to this power. It was not denied that the Judge of the London Bankruptcy Court has not this power, but it was suggested that although the Judge of the London Court has not the power, the County Court Judges have the power. That would be a strange thing. It was said that it was necessary it should be so. I cannot see such necessity, and, necessary or not, I am of opinion that the County Court has not the

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power. I am of opinion that upon every point the appellant succeeds. I am sorry to differ with the Divisional Court. I always do so with regret, but I am clearly of opinion the appeal must be allowed.

BAGGALLAY, L.J.:

The real question is whether the Bankruptcy Act, 1883, has not altered the old practice and powers of the Bankruptcy Courts. Section 102 of the Act of 1883 corresponds to section 72 of the Act of 1869; but section 72 alone did not enable the County Court to grant injunctions, sections 72 and 66 together did, and in the Act of 1883 we must find something equal to section 66 of the Act of 1869. That is found in section 100 of the Act of 1883, but the language is different, it is not the power of the Court of Chancery, but of the High Court. Those powers are limited; there is no power of granting an injunction, and it cannot confer on the County Court Judge this power. I entirely concur with the Master of the Rolls as to the other points he has mentioned, and I am also clearly of opinion that the appeal must be allowed.

BOWEN, L.J.:

As a matter of law the Divisional Court were wrong. There is no power now by which the County Court can restrain proceedings in the High Court. In the Act of 1869 the London Court of Bankruptcy obtained its power to issue injunction by a combination of sections 65 and 72 of the Act of 1869, and the County Court by a combination of sections 66 and 72 of that Act. Those two sections 65 and 66 have disappeared, and the Act of 1869 has disappeared. The new Bankruptcy Act of 1883 in section 102 is equivalent to section 72 of the Act of 1869. That defines the questions within the jurisdiction of the Courts of Bankruptcy. But where is there any similar section which up to the year 1883 used to give the local Courts of Bankruptcy the power of staying proceedings. It is admitted that the London Court of Bankruptcy has not the power, but it is said that the local Courts of Bankruptcy have, and the power is founded on section 100 of the Act of 1883. But that does not give the power to issue injunctions at all. There is, in

fact, no section in the Act of 1883 to clothe the County Courts with the power they previously possessed.

Appeal allowed with costs here and in the Divisional Court.

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Solicitors : *Scott & Barham* for Messrs. Reynolds & Co.
J. E. Fox for the trustee.

Cases relied upon or referred to :—

Ellis v. Silber, L. R. 8 Ch. App. 88 ; 42 L. J. Ch. 666 ; 28 L. T. 150.

Ex parte Brown, In re Yates, L. R. 11 Ch. Div. 148 ; 48 L. J. Bank. 78 ; 40 L. T. 58.

Ex parte Armitage, In re Learoyd & Co., L. R. 17 Ch. Div. 18.

Ex parte Price, In re Roberts, L. R. 21 Ch. Div. 553 ; 52 L. J. Ch. 181.

Ex parte Figes, 1 Glyn & J. 122.

Ex parte Harding, 1 Buck, 24.

Ex parte Leigh, 2 Glyn & J. 382.

Ex parte Cohen, L. R. 7 Ch. App. 20 ; 40 L. J. Bank. 14 ; 25 L. T. 478.

Morley v. White, L. R. 8 Ch. App. 214 ; 42 L. J. Ch. 880 ; 27 L. T. 736.

Ex parte Gordon, L. R. 8 Ch. App. 555 ; 42 L. J. Bank. 41 ; 28 L. T. 242.

In re Thorpe, L. R. 8 Ch. App. 743 ; 42 L. J. Bank. 34.

Ex parte Ditton, In re Woods, L. R. 1 Ch. Div. 557 ; 45 L. J. Bank. 87 ; 37 L. T. 109.

Cobbold v. Pryke, L. R. 4 Ex. Div. 815.

Snow v. Sherwell, 25 W. R. 438.



COURT OF IN RE PARKER & PARKER, EX PARTE THE BOARD OF
APPEAL.
TRADE.

BEFORE THE

MASTER OF
THE ROLLS,
BAGGALLAY,

L.J.,
BOWEN, L.J.
1885.

*April 25 & 27,
and May 8.*

Bankruptcy Act, 1883, Sections 9, 10, 20, 21, 54, 56, 66, and 70.

*Powers and Duties of the Official Receiver as Trustee—Sale by him of Bankrupt's
Property after Adjudication and before the Appointment of a Creditors' Trustee.*

Held: That before the appointment of a trustee by the creditors the official receiver who is, by section 54 of the Bankruptcy Act, 1883, the trustee for the purposes of that Act until a trustee is appointed, has power after an adjudication in bankruptcy has been made against a debtor, to exercise the powers given by section 56 of the Act to the trustee.

Such official receiver, therefore, may sell the property of the bankrupt.
In re Parker & Parker, Ex parte the Trustee (see *ante*, Volume 2, Page 12) overruled.

THIS was an appeal from a decision of Mr. Justice CAVE, by which he had held, that "where, before the appointment of a trustee by the creditors, the official receiver is acting as trustee in a bankruptcy for the purposes of the Act, his powers and duties are limited to those of a receiver and manager appointed by the High Court, in accordance with the provisions of section 70 of the Bankruptcy Act, 1883, and such official receiver, therefore, when so acting, may not sell any part of the property of the bankrupt."

The case in the Court below will be found reported at length, *ante*, Vol. ii. p. 12.

The bankrupts were Messrs. F. S. & W. S. Parker, the well-known solicitors in Bedford Row, against whom a bankruptcy petition was filed on March 6th, 1884.

On March 13th a receiving order was made; and on March 20th Messrs. Parker & Parker were adjudicated bankrupts.

On April 18th, 1884, the first meeting of creditors was held, at which Messrs. Turquand & Whinney were appointed trustees of the estate; and on April 21st the certificate of the Board of Trade was granted, by which the appointment of the trustees was confirmed.

Immediately after the adjudication, however, and before the

appointment of the trustees, the official receiver directed a sale by auction of the furniture and effects of the bankrupts at Courtfield Gardens and Dane End. This sale took place on March 31st, April 1st, and April 2nd, 1884, and the proceeds of it amounted to 5,583*l.* From this sum the official receiver deducted more than 380*l.* as his percentage under Table D. of the Act, and the charges of the auctioneer, amounting to 506*l.*

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Motion was thereupon made to the Court by the trustees in the bankruptcy after their appointment for an order declaring that the sale in question was *ultra vires* and unauthorised by the provisions of the Bankruptcy Act, 1883; and, further, that the percentage retained in respect of the amounts received by the official receiver in reference to such sale, together with the charges of the auctioneer for conducting the sale, should be refunded to such trustees.

On December 16th, 1884, after considerable argument, Mr. Justice CAVE made an order declaring the sale to be illegal, and ordering the percentage on the sale which had been deducted at the prescribed rate of 6 per cent. to be refunded, but allowing the charges of the auctioneer, on the ground that the sale had been honestly conducted, and had been adopted by the trustees.

From this decision the Board of Trade now appealed.

Sir *Farrer Herschell*, Solicitor-General (*Muir Mackenzie* with him), for the Board of Trade :

The point is whether between March 20th, the date of the adjudication, and April 18th, the date of the appointment of the trustees, the official receiver had the power to sell. If he had the power, there is no doubt but that it was wisely exercised. The question is of great importance, for it often happens that a considerable time elapses before the appointment of the creditors' trustee. The question turns on the provisions of the Act. Section 54, sub-section (1), provides that "until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt the property of the bankrupt shall vest in the trustee." That is without qualification or limitation. Then by sub-section (2) of the same section 54, "On the appointment of a trustee the property shall forthwith

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pass to and vest in the trustee appointed." And (3) "the property of the bankrupt shall pass from trustee to trustee, including under that term the official receiver when he fills the office of trustee, and shall vest in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever." By section 56 "Subject to the provisions of this Act, the trustee may do all or any of the following things: (1), Sell all or any part of the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt), by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels." Section 66 provides for the appointment by the Board of Trade of official receivers of debtors' estates; and by section 68, sub-section (3), "All expressions referring to the trustee under a bankruptcy shall, unless the context otherwise requires, or the Act otherwise provides, include the official receiver when acting as trustee." Section 69 deals with the duties of the official receiver as regards the debtor's conduct. And then we come to section 70 which provides "(1), As regards the estate of a debtor, it shall be the duty of the official receiver—

"(a.) Pending the appointment of a trustee, to act as interim receiver of the debtor's estate, and, where a special manager is not appointed as manager thereof:

"(b.) To authorize the special manager to raise money or make advances for the purposes of the estate in any case where, in the interests of the creditors, it appears necessary so to do:

"(c.) To summon and preside at the first meeting of creditors:

"(d.) To issue forms of proxy for use at the meetings of creditors:

"(e.) To report to the creditors as to any proposal which the debtor may have made with respect to the mode of liquidating his affairs:

"(f.) To advertise the receiving order, the date of the creditors' first meeting and of the debtor's public examination, and such other matters as it may be necessary to advertise:

"(g.) To act as trustee during any vacancy in the office of trustee.

"(2.) For the purpose of his duties as interim receiver or manager,

the official receiver shall have the same powers as if he were a receiver and manager appointed by the High Court, but shall, as far as practicable, consult the wishes of the creditors with respect to the management of the debtor's property, and may for that purpose, if he thinks it advisable, summon meetings of the persons claiming to be creditors, and shall not, unless the Board of Trade otherwise order, incur any expense beyond such as is requisite for the protection of the debtor's property or the disposing of perishable goods."

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Mr. Justice CAVE held that pending the appointment of a trustee means pending the appointment by the creditors, and that all the official receiver could do was to act as interim receiver and special manager. The real question is whether this section 70 acts as a limitation upon the powers the official receiver would have under the Act. The official receiver is, by section 54, trustee for the purposes of the Act, and the question is, whether section 70 limits his powers. The judgment in the Court below is based on the assumption that his only duties are defined by that section. I contend that there is no necessity and no warrant for construing section 70 as cutting down the powers. And further, if section 70 does operate on section 54, it must also operate on section 121 as to small bankruptcies, and its effect there would be disastrous. Section 121, sub-section (1), provides that, "If the debtor is adjudged bankrupt, the official receiver shall be the trustee in the bankruptcy." There is in ordinary cases no other trustee. But according to the judgment given, the official receiver would have no power of sale in small bankruptcies, and the section could not work.

J. Linklater (Arthur Charles, Q.C., with him) for the trustees.

The argument of the Solicitor-General has rested upon a misapprehension as to the periods assigned to bankruptcy in the Act. There are four periods in bankruptcy—(1) Receivership, pure and simple; (2) Management, from the receiving order up to the appointment of the creditors' trustee; (3) Administration and distribution; (4) Release of the creditors' trustee and the revival of the control of the official receiver. The official receiver has no power in period (3). The words "pending the appointment of a trustee"

1885. in section 70 mean pending the appointment by creditors. Section 21, sub-section (4), provides that, "The appointment of a trustee shall take effect as from the date of the certificate." There is no certificate in the case of the official receiver. And by section 21, sub-section (5), "The official receiver shall not, save as by this Act provided, be the trustee of the bankrupt's property." He is not to be the trustee except when he is specifically directed by the Act; that is, (1) Where there is a vacancy; and (2) In small bankruptcies. The whole policy of the Act is to show that until a trustee is appointed by the creditors, the whole duty of the official receiver is management. The creditors are to have a voice all through. If a case of emergency arose, the Court could order a sale: but it is certainly wrong to say the power of sale is conferred by section 56. The official receiver is not a trustee within the meaning of section 56. The wording of the division of the Act entitled "Realisation of Property," from section 50 to section 57, shows that the trustee spoken of is the trustee appointed by the creditors. Look at section 52. The official receiver cannot apply for the sequestration of a benefice, for he cannot produce any certificate of appointment. In section 55 also there would be a difficulty, for sub-section (1) provides that disclaimer may be made "at any time within three months after the first appointment of a trustee." Then the official receiver cannot be held to be the trustee mentioned in section 58, as to the declaration and distribution of dividends; that must mean the trustee appointed by the creditors. Section 68, sub-section (3), provides that "all expressions referring to the trustee under a bankruptcy shall, unless the context otherwise requires or the Act otherwise provides, include the official receiver when acting as trustee," and by section 70, sub-section 1 (g), the official receiver is "to act as trustee during any vacancy in the office of trustee." But the words in that section 70, sub-section 1 (a), "pending the appointment of a trustee," apply to all the clauses of that sub-section except the last. Look at the section. The official receiver, pending the appointment of a trustee, is "to act as interim receiver of the debtor's estate," and where a special manager is not appointed as manager thereof, and by sub-section (2), "for the purposes of his duties as interim receiver or manager, the official receiver shall have the same powers as if he were a receiver and

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manager appointed by the High Court," and must consult the wishes of the creditors ; and shall not incur expense, &c. Then sections 72, 75, and 82, cannot apply to the official receiver. Different phrases are used in different parts of the Act where the trustee is spoken of : for example, in section 54 we find the expression, " the trustee for the purposes of this Act " ; in section 68 we have " the trustee under a bankruptcy " ; and so in other cases. It is impossible to reconcile all these phrases, still I submit that section 56 does not include the official receiver, unless in the case of a vacancy in the office of trustee, as specified in section 70, subsection 1 (g). As to the question with regard to the difficulty which it is said must arise in connection with section 121 and small bankruptcies. That section is a distinct enactment by itself, and applies to a distinct state of affairs. It modifies the Act : and the objection does not apply.

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THE MASTER OF THE ROLLS (BRETT) :

In this case a receiving order was made against the bankrupts, Judgment and the official receiver thereby constituted. Before the creditors' trustee was appointed the official receiver sold certain property. It is not denied that such sale was beneficial to the estate. It has been adopted by the trustee. The dispute in this case is in fact on a small matter. Yet in order to settle a small dispute an important question is raised. The real dispute is that the creditors' trustee disapproved of having to pay the 6 per cent. on the sale. He has taken the ground, therefore, that the official receiver had no right to sell at all. The question is whether the official receiver being trustee in terms has the power to sell before the creditors' trustee is appointed. It is said on the one side, if the official receiver can sell, there is no check upon him. It is said on the other side, if he cannot sell, then, however important it may be for the estate, nothing can ever be sold until the creditors have appointed their trustee. Now, my judgment in this case will go on a much-used rule of construction. That rule is this, that you are to take the words of an Act of Parliament in their ordinary sense unless something compels and obliges you to change them. Section 9 of the

1885. Bankruptcy Act provides that "on the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor." These official receivers are the servants of the Board of Trade. By section 20, "Where a receiving order is made against a debtor, then, if the creditors at the first meeting or any adjournment thereof by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, * * * the Court shall adjudge the debtor bankrupt: and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee." The moment the Court shall adjudge the debtor bankrupt, the property shall vest in a trustee. Now go to section 54, "Until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee." That is the official receiver who has just been appointed. Now what can the trustee do? Section 56 says he may "sell all or any part of the property of the bankrupt." It is this. The official receiver is appointed: the official receiver until the creditors' trustee is appointed shall be the trustee. What may a trustee do? Subject to the provisions of this Act, he may sell. Now, have any arguments been adduced to alter the plain rule I have spoken of. It was urged that the Act provides that the official receiver may be a trustee with full powers of a trustee if there is a vacancy in the office of trustee, but not in any other case. But to adopt that construction it seems to me it would be necessary to alter the Act by reading into it whole sentences. Another point which has been made was the division of the proceedings into four stages. But the moment you attempt to divide things you get into a fallacy. There may be cross divisions. A great many other difficulties were raised in the view that in certain sections if you give a simple meaning to this section there must be tautology. I must confess I was not much influenced by that, nor do I think that the mere fact the statute may be to some extent tautologous ought to prevent us from reading the words of the Act in their ordinary meaning. An argument was used by the Solicitor-General with regard to section 121, that if the judgment in the Court below was allowed to stand there would be great difficulty with regard to small bankruptcies. Even that argument did not impress me as

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perhaps the Solicitor-General thought it ought to do. I base my judgment entirely upon the one rule, that the sections are plain in their language, and there is nothing to take away from them their ordinary meaning. I am of opinion, therefore, that the official receiver had the power of sale, and that being so, he was entitled to deduct the 6 per cent.

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BAGGALLAY, L. J.:

I am of the same opinion. The property in this case was of the value of over 5,000*l.*, upon which the expenses came to about 800*l.*, of which 880*l.* included the commission in dispute. Mr. *Linklater*, in his very able argument, has endeavoured to draw a distinction between the powers and duties of the official receiver, and the powers and duties of the trustee. The Bankruptcy Act provides in section 9 that "on the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor." But before a receiving order is made it may be important to constitute an official receiver for the protection of the estate, and so it is provided by section 10 that "the Court may, if it is shown to be necessary for the protection of the estate, at any time after the presentation of a bankruptcy petition, and before a receiving order is made, appoint the official receiver to be interim receiver of the property of the debtor, or of any part thereof, and direct him to take immediate possession thereof, or of any part thereof." Now note the difference between the language used in section 9 and that in section 10. In section 9 the title of the official receiver is not limited in any way, but in section 10 he is to be *interim* receiver. The point is worthy of notice. Then section 20 provides for adjudication, and then we come to sections 54 and 56 forming part of a series of sections headed "Realisation of Property." Until a trustee is appointed "The official receiver shall be the trustee for the purposes of the Act, and immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee." Who is this trustee? It must be the official receiver in the majority of cases. It is plain—that the property of the bankrupt vests in the official receiver *quod* trustee. That opinion is made still stronger by sub-section (3) of section 54, which provides that "the property of the bankrupt shall pass from

1885. trustee to trustee, including under that term the official receiver when he fills the office of trustee." It has been argued that that means when there is a vacancy. But why should it be limited to that case? In the view I have taken we have a complete chain of trustees. First, the official receiver until the creditors' trustee is appointed: then, the creditors' trustee: then, if a vacancy occurs, the official receiver again, until another appointment is made. Going on further, section 56 provides that the trustee may sell. The language of the section is large enough to cover all that the official receiver has done in this case. We have been referred to section 68, sub-section (3), and to section 70, sub-section 1 (g); and great reliance has been placed on sub-section (2) of that section 70 as limiting the powers of the official receiver. But that is when he is interim receiver, and in no way deals with his duties when he is acting as trustee. I am of opinion, therefore, that the appeal must be allowed.

BOWEN, L. J.:

I quite agree. When we differ with the Court below, it is usual for each of us, out of respect to the judge below, to express our opinions separately. In the face of the detailed judgments which have been already given, however, I do not purpose to add anything further.

Appeal allowed.

Linklater: I am instructed to ask for leave to appeal to the House of Lords.

THE MASTER OF THE ROLLS:

I should like to know what is the effect of our giving such leave.

Linklater: The trustees would be personally liable for costs, with liberty to take them out of the estate.

THE MASTER OF THE ROLLS:

That is rather too fine a distinction for me. The estate would have to pay. I do not see why the creditors should pay in this estate for the benefit of future estates. I think leave to appeal

IN RE
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should only be given provided that you call a meeting of the creditors and obtain their consent.

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THE MASTER OF THE ROLLS: Most certainly not. You can only have leave to appeal if you call a meeting of the creditors, and they give you leave and express their desire that you should appeal.

BAGGALLAY, L. J.:

The amount really in dispute in this case is very small.

BOWEN, L. J.:

And you must not forget this, Mr. *Linklater*, that apart from what has been said to-day, in the present case the trustees adopted what the official receiver had done.

Solicitors: *The Solicitor to the Board of Trade* for the Board of Trade.

Linklater and Son for the Trustee.

IN RE WALLACE, EX PARTE CAMPBELL AND OTHERS.

COURT OF
APPEAL.

Bankruptcy Act, 1883, Section 18, sub-section (6); Section 28, sub-sections (3) and (4).

BEFORE THE
MASTER OF
THE ROLLS,
BAGGALLAY,
L.J.,

Refusal of Court to approve Composition—Report of Official Receiver—Evidence.

BOWEN, L.J.
1885.

On a contention raised that although for the purposes of the discharge of a bankrupt under section 28 of the Bankruptcy Act, 1883, the report of the official receiver is *prima facie* evidence of the truth of the statements therein contained, nevertheless for the purposes of the approval of a composition or scheme under section 18, sub-section (6) of the Act, such report is not made *prima facie* evidence, and that the registrar ought not to refuse to approve a composition without having the facts mentioned in section 28, sub-section (3), proved by other evidence.

May 8.

Held: That the report of the official receiver is *prima facie* evidence for the purposes of section 18, sub-section (6), and that the same proof of

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—
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the facts referred to in section 28, sub-section (3), which is sufficient in the case of the discharge of a bankrupt under that section would also be sufficient proof in the case of the approval of a composition or scheme under section 18, sub-section (6).

Per BRETT, M. R.—(1.) That in deciding as to the granting or refusing the discharge of a bankrupt or the approval of a composition or scheme of arrangement the question whether the debtor has kept proper books is one of primary importance.

(2.) That it is no ground to set aside the decision of the registrar refusing to approve a composition because a large majority of the creditors of a debtor are desirous of accepting it, but that the object of the Bankruptcy Act, 1883, being to prevent reckless debtors from escaping the consequences of their conduct by the payment of a nominal dividend, it is the duty of the Court to protect such creditors from themselves.

THIS was an appeal on behalf of the creditors of the debtor *J. J. Wallace* against an order of the Registrar, whereby he had refused to approve a composition of 1*s.* in the pound offered by the debtor and accepted by the said creditors under section 18 of the Bankruptcy Act, 1883.

By sub-section (5) of section 18, “The Court shall, before approving a composition or scheme, hear a report of the official receiver as to the terms of the composition or scheme, and as to the conduct of the debtor, and any objections which may be made by or on behalf of any creditor.”

And by sub-section (6), “If the Court is of opinion that the terms of the composition or scheme are not reasonable, or are not calculated to benefit the general body of creditors, or in any case in which the Court is required under this Act where the debtor is adjudged bankrupt to refuse his discharge, the Court shall, or if any such facts are proved as would under this Act justify the Court in refusing, qualifying, or suspending the debtor’s discharge, [See *Bankruptcy Act, 1883, section 28, sub-sections (2) and (3)*], the Court may, in its discretion, refuse to approve the composition or scheme.”

The debtor, *J. J. Wallace*, carried on business as a ship broker in Great St. Helen’s, and a receiving order was made against him in the present bankruptcy in October, 1884. He had previously been bankrupt in the year 1877, however, and had also filed a liquidation petition in 1881, under which he had paid a very small sum.

When application was made to the Court to approve the composition of 1s. in the pound which was now offered, the usual report of the official receiver was read in which three grounds of complaint were set out : (1) that the books of the debtor had not been properly kept ; (2) that he had before taken advantage of the bankrupt laws ; (3) that he had been guilty of extravagance in his living.

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IN RE
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Under these circumstances, the Registrar refused the necessary sanction of the Court, and from this decision the creditors, who were desirous of accepting the composition offered, now appealed.

Herbert Reed for the appellant creditors :

I appear for creditors to the extent of nearly 10,000*l.* The failure of the debtor is entirely attributable to the depreciation in the shipping trade, and also to three bad debts. This 1s. is to be paid free from all deductions, and is clearly for the benefit of the creditors. There is the question, whether the report of the official receiver is evidence at all. It is true that by sub-section (4) of section 28 of the Act it is provided that, "For the purposes of this section the report of the official receiver shall be *prima facie* evidence of the statements therein contained," and looking at the wording of sub-section (6) of section 18, the report may also be evidence in the case of a composition. But if it were not for this the report would not be evidence.

[*BAGGALLAY, L. J.* : Sections 68 and 69, dealing with the status of the official receiver, and his duties as regards the debtor's conduct, might have some application if there was any doubt.]

[*THE MASTER OF THE ROLLS* : What were the assets and debts in this case ?]

The assets are 740*l.*; the debts amount to 14,000*l.*

[*THE MASTER OF THE ROLLS* : Do you mean to say that the depreciation in ships has caused a fall from 14,000*l.* to 740*l.*?]

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EX PARTE
CAMPBELL
AND OTHERS.

Judgment.

Sidney Woolf for the debtor, followed.*Muir Mackenzie* for the official receiver, was not called on.

THE MASTER OF THE ROLLS (BRETT) :

Whenever certain heads of complaint are made known to the registrar, he is entitled to exercise his discretion in refusing to approve a composition or scheme which has been submitted to him. It would require a very strong case to induce us to overrule that exercise of discretion. In this case certain grounds of complaint were set out by the official receiver. By section 28, sub-section (4), the report of the official receiver is made evidence, and under section 18, sub-section (6), it is also evidence in the case of a composition. We certainly cannot say here that the registrar exercised his discretion wrongly. I, for my part, say distinctly, that the proper keeping of books is a matter of primary importance. A person is most reckless who does not keep proper books. It shows that the trader is utterly regardless of anyone but himself. It is quite certain that a trader who does not keep books will sooner or later be bankrupt. In this case it is plain that the debtor drew out for his own purposes all the money he could possibly lay his hands on. He has been a reckless trader for years. He has failed three times. He failed first, I find, for 13,000*l.*; then for 10,000*l.*; and now for 14,000*l.* These amounts speak for themselves. But it is said we ought to set aside the decision of the registrar, because the creditors desire it. Now that was one of the chief things which this new Act was to prevent. It is not generosity in the creditors to take a 1*s.* in the pound, and I will not call it so. It is mere laziness. This Act was meant to prevent that. The registrar must, in a case of this kind, act on his own responsibility, and protect lazy creditors in spite of themselves. The registrar has acted perfectly rightly, and the appeal will be dismissed.

BAGGALLAY, L. J.: I entirely agree.*BOWEN, L. J.:* And I also.*Appeal dismissed.*

Muir Mackenzie: I ask that the official receiver may have his costs.

THE MASTER OF THE ROLLS: You will have them out of the deposit.

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IN RE
WALLACE,
EX PARTE
CAMPBELL
AND OTHERS.

Solicitors: *H. Bagot Harte* for the creditors, and also for the debtor.

W. W. Aldridge for the official receiver.

IN RE RYLEY, EX PARTE THE OFFICIAL RECEIVER.

Bankruptcy Act, 1883, Section 9 and Section 121; County Court Rules, January, 1884, Rules (1) and (2).

BEFORE
MR. JUSTICE
CAVE.
1885.
May 11.

Default in Payment of Instalment of Judgment Debt—Receiving Order—Arrest of Debtor—Payment under Protest—Claim of Official Receiver.

On February 12th, 1885, a receiving order was made against the debtor, and on February 23rd, the summary administration of his estate was ordered under section 121 of the Bankruptcy Act, 1883.

On February 25th, while on his way to the office of the official receiver for the purpose of handing to that officer certain moneys which he had been ordered to pay over, the debtor was served by the serjeant-at-mace of the Mayor's Court with an order of commitment for having failed to pay an instalment of 2*l.* 8*s.* 6*d.* due under a judgment previously obtained in that Court.

This sum, in order to avoid arrest, the debtor paid under protest. On application made by the official receiver that it should be paid over to him.

Held: That under section 9 of the Bankruptcy Act, 1883, the creditor lost the right to enforce the payment by arrest, and that the official receiver was entitled to the money.

THIS was an application on behalf of the official receiver for an order that the sum of 2*l.* 8*s.* 6*d.*, now in the hands of the serjeant-at-mace of the Lord Mayor's Court, and paid to him by the debtor subsequently to the date of the receiving order should be paid over to the official receiver.

1885. On February 12th last a receiving order was made against the debtor *Ryley*, who is the Registrar of the Whitechapel County Court, and on February 23rd an order was made for the summary administration of his estate under section 121 of the Bankruptcy Act, 1883.

In the course of the proceedings the debtor applied to the official receiver for an allowance out of his assets, but before consenting to the application the official receiver required him to pay over so much of his salary as registrar as was then due.

On February 25th the debtor was accordingly on his way to the office of the official receiver for this purpose when he was arrested by the serjeant-at-mace of the Mayor's Court, and served with an order of commitment, he having failed to pay an instalment of 2*l.* 8*s.* 6*d.* due to Messrs. *A. Jones & Co. (Limited)* under a judgment previously obtained by them against him in that Court.

The debtor immediately informed the serjeant-at-mace that the receiving order had been made, but that officer nevertheless required payment, and to avoid imprisonment the debtor paid the amount under protest.

The official receiver subsequently applied to the serjeant-at-mace to hand over the money, but this request was refused and an application made by Messrs. *Jones & Co.*, the creditors who had issued the process, to the judge of the Mayor's Court for an order authorising payment to them was adjourned in order that the matter might now be brought to the notice of the Bankruptcy Court.

Muir Mackenzie for the official receiver.

After the receiving order was made section 9 of the Bankruptcy Act, 1883, applied, and the creditor had no right to enforce process on the execution of the debt. Section 9 provides that "On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings

unless with the leave of the Court and on such terms as the Court may impose." In the case of *Cobham v. Dalton* (L. R. 10 Ch. App. 655; 44 L. J. Ch. 702), it was held that "a debtor who is liable to be arrested under the Debtors Act, 1869, s. 4, is protected from arrest by the Bankruptcy Act, 1869, s. 12, during the pendency of his bankruptcy or liquidation by arrangement." (Counsel also referred to the judgment of MELLISH, L. J., in the above case: and to the case of *Lees v. Newton*, 35 L. J. C. P. 285.) The arrest of the serjeant-at-mace was in the nature of an execution. The money paid to him really belonged to the creditors, and the official receiver is entitled to have it handed over to him.

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EX PARTE
THE OFFICIAL
RECEIVER.

J. Tucker (solicitor) for Messrs. Jones & Co.

There was nothing to show that this money was the property of the debtor. It was not ear-marked.

[CAVE, J.: If a man has money in his pocket, *prima facie* it belongs to him.]

Then the debtor paid the money in order to purge the contempt of which he had been guilty in disobeying the order of the Court. The debt was not an ordinary one due from the debtor.

CAVE, J.:

I am of opinion that section 9 of the Bankruptcy Act, 1883, and Judgment, the case of *Cobham v. Dalton* apply in this case, and that the creditor lost by section 9 his right to enforce the payment by arrest. I am clearly of opinion that this is the true construction of the Act, and that opinion is borne out by the County Court Rules of January, 1884. By those rules "(1) Where a judgment-debtor shall upon the return day of a judgment summons satisfy the Court that a receiving order has been made for the protection of his estate, or that he has been adjudicated a bankrupt, and that the debt was provable in the bankruptcy, or that in respect of the debt, resolutions have been duly registered under the 125th or 126th sections of the Bankruptcy Act, 1869, or that an order has been made for the administration of his estate under section 122 of the Bankruptcy Act, 1883, no order of commitment shall be made." That does tend to

1885. show that the order of commitment is not a process for contempt of
IN RE RYLEY, Court or a punishment, but simply the means of enforcing payment
EX PARTES of the debt. And "(2) Where a judgment debtor shall after the
THE OFFICIAL making of an order of commitment against him, file in the Court
RECEIVER. in which the order was made, an affidavit according to the form in
the appendix, stating that a receiving order has been made for the
protection of his estate, or that he has been adjudicated a bankrupt,
and that the debt was provable in the bankruptcy, or that in respect
of the judgment debt resolutions have been duly registered under
either of the before-mentioned sections of the Bankruptcy Act,
1869, or that an order for the administration of his estate has been
made under section 122 of the Bankruptcy Act, 1883, annexing to
such affidavit in such last-mentioned case a certificate of the
registrar of the Court in which such last-mentioned order shall
have been so made, and shall forthwith, upon such affidavit being
so filed, give notice to the judgment creditor of the filing thereof,
such order of commitment shall not issue, but if issued and not
executed, it shall be recalled." I am of opinion, therefore, that
the official receiver is entitled to the order asked for with costs.

Order accordingly.

Solicitors: *The Solicitor to the Board of Trade* for the official
receiver.

J. Tucker for Messrs. Jones & Co.

Cases referred to or relied upon :—

Cobham v. Dalton, L. R. 10 Ch. App. 655; 44 L. J. Ch. 702.
Lees v. Newton, 85 L. J. C. P. 285.

PRACTICE.

THE QUEEN v. THE REGISTRAR OF THE GREENWICH COUNTY COURT.

Bankruptcy Act, 1883, Section 17, sub-section (4).

Public Examination—Solicitor representing Creditor—Authority in Writing.

Held: That the provisions of section 17, sub-section (4) of the Bankruptcy Act, 1883, by which at the public examination of a debtor "any creditor who has tendered a proof, or his representative authorised in writing may question the debtor concerning his affairs and the causes of his failure," apply to a solicitor representing a creditor who has tendered a proof, and that such solicitor before being permitted to examine a debtor at his public examination must produce, if so requested, his written authority from such creditor.

In re Landrock (see *ante*, Volume I., page 21) overruled.

COURT OF
APPEAL,
BEFORE THE
MASTER OF
THE ROLLS,
BAGGALLAY,
L.J.,
BOWEN, L.J.,
1885.
May 13.

THIS was an appeal from a decision of a Divisional Court consisting of Mr. Justice GROVE and Mr. Justice HAWKINS, and raised the important question whether or not under the Bankruptcy Act, 1883, a County Court Registrar sitting in bankruptcy has a right to refuse to permit a solicitor on behalf of a creditor to examine a debtor at a public examination without producing his written authority.

Section 17, sub-section (4) of the Bankruptcy Act, 1883, provides that "Any creditor who has tendered a proof, or his representative authorised in writing, may question the debtor concerning his affairs and the causes of his failure."

In the present case the registrar of the Greenwich County Court had refused to allow a solicitor who appeared on behalf of certain creditors to question a debtor at his public examination unless he produced an authority in writing to do so.

The solicitor and the Incorporated Law Society thereupon applied to a Divisional Court under the 19 & 20 Vict. c. 108, s. 43, for an order directing the registrar to allow the solicitor to question the debtor, but this application was refused.

From this decision the solicitor and the Incorporated Law Society now appealed.

R. T. Reid, Q.C. (Linklater with him), for the appellants.

A creditor has a perfect right to be represented by counsel or a

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solicitor. The intention of section 17, sub-section (4) of the Bankruptcy Act, 1883, is to allow a creditor to authorise in writing some person other than counsel or solicitor to represent him at the public examination of a debtor. It does not apply to the case of a solicitor. In the case of *In re Landrock* (see *ante*, Volume I., p. 21), Mr. Registrar Hazlitt held "That a solicitor appearing for a creditor at the public examination of a bankrupt, for the purpose of examining the bankrupt as to his affairs, need not be authorised in writing." Moreover section 151 of the Act which provides that "Nothing in this Act, or in any transfer of jurisdiction effected thereby, shall take away or affect any right of audience that any person may have had at the commencement of this Act, and all solicitors or other persons who had the right of audience before the Chief Judge in Bankruptcy shall have the like right of audience in bankruptcy matters in the High Court," shows that the object of the Act is to preserve the right of audience. The solicitor here was acting as an advocate, and was therefore entitled to audience.

THE MASTER OF THE ROLLS (BRETT) :

Judgment.

In this case the registrar of a County Court sitting in bankruptcy declined to hear a solicitor who desired under section 17, sub-section (4) of the Bankruptcy Act, 1883, to question a debtor at his public examination concerning his affairs, unless the solicitor produced an authority in writing from the creditor, which he declined to do. It is said that the Court ought to direct the registrar to allow the solicitor to examine the debtor without producing an authority in writing upon the ground that section 17, sub-section (4), does not apply to solicitors. Now it appears to me that there are two objections to granting the application in the present case. (1.) Because the solicitor is not the person who can make such an application under section 43 of the 19 & 20 Vict. c. 108; and (2), even supposing that the solicitor could make the application the true construction of section 17, sub-section (4) of the Bankruptcy Act, 1883, is that it includes a solicitor, so that the registrar was justified in what he did. As to the first objection, I am of opinion that section 43 of the 19 & 20 Vict. c. 108, does not apply to solicitors. In this case, if the registrar was wrong in refusing to give audience to the solicitor, the proper person to

complain was the creditor himself. The word "party" in that section means a litigant in the Court, and a creditor or a person assuming to be a creditor is a litigant within the meaning of the section. But a larger view may be taken. It may be said that the solicitor here was not applying only on his own behalf, but as the representative of the whole body of solicitors, and that therefore the registrar in refusing him a right of audience had refused to the whole body of solicitors a right to which it was entitled, so that the Court for the protection of its officers should hear the application. That is one way of stating the question raised as to section 43, which, however, it is not necessary to determine because the registrar was in my opinion right in the view he took. As to the second objection, which depends upon the construction to be put upon sub-section 4 of section 17 of the Bankruptcy Act, 1883, the question is whether a solicitor who appears when and for the purpose for which this solicitor appeared is a representative who must be "authorized in writing" within the meaning of the sub-section. The section does not apply to counsel, for he can only act in Court; he has the whole conduct of the case and can act even against the instructions of his client. A counsel therefore is not the representative of his client, and does not require any authority in writing. But the normal character of a solicitor is to act both in and out of Court for his client; he is therefore in ordinary and by legal language the representative of his client, and coming within the very words of sub-section 4 of section 17 must be "authorized in writing." He must therefore submit to that which is no indignity at all, and must produce his authority in writing if requested to do so. If he does not produce it when requested, he cannot at that meeting represent the creditor. It is a matter for the registrar to consider whether he will ask all solicitors or any particular solicitor in any particular case to produce the written authority, but there is not the smallest indignity in having to submit to the section. I think the case comes within the sub-section, and even supposing we had power to hear the application our decision must in either view be against the applicants.

AGGALLAY, L. J.:

I am of the same opinion. A debtor against whom a receiving

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order has been made is bound, under section 16, to submit a statement of his affairs to the official receiver. Then section 17 makes provision for the public examination of the debtor, and there are various species of questionings to which he may be subjected, namely, as to his conduct, dealings, and property. I think the absence of any reference in subsection (4) of section 17, as to the employment of counsel or solicitors, when we find it in subsection (5), has a bearing upon the question before us. I think, apart from any consideration of solicitor or counsel, that the subsection has reference to the creditor himself, or his representative authorised in writing, who is to question the debtor. The solicitor here comes within the provisions of the subsection, and the mere fact of his being a solicitor does not entitle him to question the debtor, unless he has been authorised in writing to do so by a creditor who has tendered a proof.

BOWEN, L. J.:

I am of the same opinion, and I quite agree with the view taken as to the construction of section 17, subsection (4).

Appeal dismissed.

Solicitor : *E. W. Williamson* for the appellants.

CASE relied upon :—

In re Landrock. See *ante*, Volume I., page 21.

IN RE LINTON, EX PARTE LINTON.

*Bankruptcy Act, 1883, Section 37—29 & 30 Vict. c. 32—Debtors Act, 1869,
Section 5.*

*Proof—Order of Divorce Court for Payment of Monthly or Weekly Alimony—
“Debt or Liability.”*

COURT OF
APPEAL.
BEFORE THE
MASTER OF
THE ROLLS,
BAGGALLAY,
L.J.,
BOWEN, L.J.
1885.

May 15 & 22.

Held: That where an order is made by the Divorce Court for the future payment of alimony by a husband under the statute 29 & 30 Vict. c. 32, s. 1, such payments are not capable of valuation and cannot therefore be proved for in the event of the husband being adjudicated bankrupt, but such husband is liable to continue the payments notwithstanding the bankruptcy.

THIS was an appeal from a decision of Mr. Justice CAVE, and raised the important question whether future payments of monthly or weekly alimony ordered by the Divorce Court under the provisions of the statute 29 & 30 Vict. c. 32, to be paid by a husband to his wife, are provable in the bankruptcy of the husband, thereby, in fact, discharging such husband, by his bankruptcy, from his obligation to make the payments.

In the present case, on February 15th, 1883, an order was made against *John Pierson Linton* by the Divorce Court, for alimony for his wife *Helen Linton*, at the rate of 1l. 15s. a week, payable monthly.

These payments, after being kept up for a short time, got into arrear, and eventually *Linton* presented his own petition, and on May 16th, 1884, was adjudicated bankrupt.

Helen Linton, the wife, duly proved in the bankruptcy for the arrears of alimony due to her at the date of the adjudication.

No more payments were made by the husband, *J. P. Linton*, however, and the wife in consequence took out a judgment summons in respect of 70l. arrears of alimony, which had accrued due since the adjudication.

The case came on for hearing before Mr. Justice CAVE on March 14th last, when it was objected on behalf of the husband that the payments of alimony future at the date of the receiving order were a “debt or liability,” which was made provable in the bankruptcy

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by section 37 of the Bankruptcy Act, 1883, and that the wife had consequently no other remedy in respect of them.

The learned Judge, however, decided that the future payments were not provable in the bankruptcy, and he made an order directing the husband, *John Pierson Linton*, to pay the sum of 12*l.* a month to the wife until the arrears were cleared off, after which payment might again be made at the rate of 1*l.* 15*s.* weekly, as originally ordered.

From this decision the husband, *J. P. Linton*, now appealed.

E. Cooper Willis, Q.C. (F. C. Willis with him) for Linton.

I say that the alimony is provable. Section 37 of the Bankruptcy Act, 1883, which deals with the description of debts provable in bankruptcy provides "(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy; (2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice; (3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy." Then section 9 says "(1) On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose."

[THE MASTER OF THE ROLLS: What is the liability here? It is an order of the Court. Who is the man liable to except to the Court?]

There is a creditor for this debt: Mrs. Linton.

[BOWEN, L. J.: The agreement could not have been enforced without an order of the Court. It became operative by becoming an order of the Court.]

The intention of the Bankruptcy Act was that all liabilities except damages for tort should be removed by the bankruptcy.

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[BOWEN, L. J.: Does not a liability under section 37 mean a liability to some person and not to the Court ?]

They have taken out a summons against us for disobedience of the order of the High Court.

[THE MASTER OF THE ROLLS : It is not for disobedience at all. It is for not paying what you could and ought to have paid.]

Then they have no right against us under section 9 other than in the manner directed by the Act.

Yate Lee for Mrs. Linton :

This man is a solicitor. He is acting as a managing clerk. He has an income of 300*l.* or 400*l.* a-year. His assets are set down as *nil*. He has valued this alimony at 1700*l.* He made himself bankrupt and says the alimony must be proved for and then I am free. The liability to pay is clearly within section 5 of the Debtors Act, 1869. It was a proper case in which to take out a summons under the Debtors Act. This is not a debt within sub-section (8) of section 37 of the Bankruptcy Act, 1883, which provides that “ ‘ Liability ’ shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money’s worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money, or money’s worth, whether the payment is, as respects amount fixed or unliquidated ; as respects time, present or future, certain or dependent on any one contingency or on two

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or more contingencies ; as to mode of valuation capable of being ascertained by fixed rules, or as matter of opinion." Now alimony is a right to receive a certain sum of money which may be increased or diminished according to the man's means. In the case of *Prescott v. Prescott* (20 L. T. N. S. 381), it was held that " an order for permanent alimony made until further order under the terms of the 29 Vict. c. 85, s. 1, is not an annuity which can be valued and proved in bankruptcy." That principle still applies, for in the case of *In re Robinson* (L. R. 27 Ch. Div. 160) Lord Justice LINDLEY said ". . . and *Prescott v. Prescott* (20 L. T. 381) shews that a claim to alimony is not provable in the husband's bankruptcy."

May 22nd.

THE MASTER OF THE ROLLS (BRETT) :

Judgment.

In this case an order was made under the statute 29 & 30 Vict. c. 32 by the Divorce Court upon the bankrupt to pay weekly alimony to his wife. It seems from the first moment that the order was made this man set his mind to disobey it. Although he had ample means to pay, first, he gets into arrear ; then he files his own petition in bankruptcy ; then, after adjudication has taken place, he says the alimony in the future must be proved for. Upon that a summons is issued, and the question has arisen whether this alimony which would become due after his bankruptcy, this man can get rid of paying by a self-imposed bankruptcy. Any conduct more disgraceful than this I cannot think of. But, nevertheless, the trick might be successful. Let us consider if it can be successful. The alimony is given under the statute 29 & 30 Vict. c. 32, which is an Act further to amend the procedure and powers of the Court for Divorce and Matrimonial Causes, and provides in section 1 that, " In every such case it shall be lawful for the Court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable : provided always, that if the husband shall afterwards from any cause become unable to make such payments it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the

whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the Court may seem fit." What the statute hits at is a case where a person has no property, but is earning an ample livelihood. The Court is not empowered to impose a lump sum, only a weekly or monthly payment, and there is also the power, if circumstances alter, to make the man pay less, and, I hope, more. It is only necessary to look at the Act to see what kind of alimony it is. Now we come to the bankruptcy. What becomes of the man's personal earnings? They do not go to his creditors, but he keeps them himself. He is precisely as well able to pay the alimony after the bankruptcy as he would be before it. I speak of the future instalments becoming due after the bankruptcy, and which the creditors would get no advantage from, but which the bankrupt would put into his own pocket. It would be extraordinary if any person were allowed to do such a thing as this. It is said that these future instalments can be proved in bankruptcy, and the reason given for that is, that they can be valued. But they are not an annuity. There is a question whether, when an order is thus made under the statute, the bankruptcy law would allow it to be valued. Besides, it cannot be valued. It is not intended that such an order should be interfered with by the bankruptcy law. It is not within the bankruptcy, and is not affected by it. I am clearly of opinion that this appeal wholly and righteously fails, and that a man cannot evade this liability by making himself bankrupt.

BAGGALLAY, L. J. :

I am of the same opinion. The question is whether alimony accruing due or which would accrue due subsequently to the bankruptcy can be proved for in the bankruptcy. I am clearly of opinion that it cannot. The amount might be from time to time varied. It might be increased. There is no means whatever of putting any value upon it. The case is very different for alimony accrued due and not paid previous to adjudication.

BOWEN, L. J. :

I am of the same opinion. The question is whether the bankrupt is whitewashed from keeping his wife from year to year by the

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Bankruptcy Act, and can compel her to prove at once for the alimony which has been ordered, and starve. It would be most unrighteous to suppose any such thing. The liability to be proved for, must be a liability capable of being estimated in some way or other, and this liability to pay alimony is not.

Appeal dismissed with costs.

Solicitor : *W. G. Place*, for the appellant husband.
Field, Roscoe & Co., for the wife.

Cases relied upon and referred to :—

Prescott v. Prescott, 20 L. T. N. S. 331.
In re Robinson, L. R. 27 Ch. Div. 160.

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PRACTICE.

DIVISIONAL
COURT.

BEFORE
CAVE, J.,
AND
WILLS, J.
1885.

May 19.

IN RE HEWITT, EX PARTE HEWITT.

*Bankruptcy Act, 1883, Sections 27 & 125—Bankruptcy Rules, 1883, Rule 58—
Rules of Supreme Court, 1883, Order XXXVII., Rule 5.*

*Administration in Bankruptcy of Estate of Person dying Insolvent—Power to
Examine Witnesses.*

Where an order of commitment was made against the widow and son of a deceased debtor whose estate was being administered in bankruptcy under the provisions of section 125 of the Bankruptcy Act, 1883, on the ground that they had refused to comply with an order of the County Court directing them to attend for the purpose of being examined with regard to the estate of such deceased debtor under section 27 of the Act.

Held : That section 27 of the Bankruptcy Act, 1883, does not apply to section 125 of the Act : that the powers under Order XXXVII., Rule 5 of the Supreme Court Rules, 1883, as to the examination of witnesses only exist where some litigation is in progress : and that rule 58 of the Bankruptcy Rules, 1883, does not give any such power as was sought for in the present case.

THIS was an appeal from an order of the learned judge of the Dewsbury County Court, and raised an important question as to the

powers of the Court to order the examination of witnesses under section 27 of the Bankruptcy Act, 1883, for the purposes of the discovery of property, in the administration of the estate of a deceased insolvent under the provisions of section 125 of the Act.

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Section 27 of the Bankruptcy Act, 1883, provides that “(1) The Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property. (2) If any person so summoned after having been tendered a reasonable sum, refuses to come before the Court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may, by warrant, cause him to be apprehended and brought up for examination. (3) The Court may examine on oath, either by word of mouth or by written interrogatories, any person so brought before it concerning the debtor, his dealings or property.”

Section 125 of the Act contains provisions for the administration in bankruptcy of the estate of a person dying insolvent, and one *Richard Hewitt* having died insolvent, an order for the administration of his estate in bankruptcy under the section was made in the Dewsbury County Court.

An application was subsequently made and an order obtained by the official receiver upon *Hannah Hewitt*, the widow, and *Walter Hewitt*, the son of the deceased debtor, calling upon them to appear for examination with regard to the estate.

This order was not complied with, however, and an order of commitment was in consequence made by the County Court judge against both these persons.

From this order *Hannah Hewitt* and *Walter Hewitt* now appealed.

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In re
Hewitt,
Ex parte
Hewitt.

Herbert Reed for the appellants.

The County Court Judge had no power to compel the attendance of either of these persons as witness, and the order of commitment is therefore wrong. The real question is whether Section 27 of the Bankruptcy Act, 1883, applies to cases in which the estate of a deceased debtor is being administered in bankruptcy. I submit that it does not, and it is clear that it does not from the words of the section itself. The section begins "The Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon, &c." It says distinctly "at any time after a receiving order has been made." But an order for the administration of the estate of a deceased insolvent is not a receiving order. There is nothing in the Act to show that it shall be treated as such. The County Court Judge in making the order for examination relied also on Rule 58 of the Bankruptcy Rules, 1883, which provides that "The Court may, in any matter where it shall appear necessary for the purposes of justice, make an order for the examination upon oath before the Court or any officer of the Court, or any other person and at any place, of any witness or person, and may empower any party to any such matter to give such deposition in evidence therein on such terms, if any, as the Court may direct." But the learned County Court Judge had no power in this case to act under that rule, nor has the Court a general power of summoning witnesses under Order XXXVII., rule 5 of the Rules of the Supreme Court, 1883, unless there is a matter pending and some litigation is actually in progress. (Counsel referred to *Warner v. Mosses*, L. R. 16, Ch. Div. 100; 48 L. T. N. S. 201; *Ex parte Willey, In re Wright*, L. R. 23 Ch. Div. 118; 52 L. J. Ch. 546; 48 L. T. N. S. 380.)

Muir Mackenzie for the official receiver:

For all practical purposes the proceedings in the administration in bankruptcy of the estate of a deceased debtor are proceedings in bankruptcy. An administration order in a case where the debtor is dead is exactly the same as a receiving order where the debtor is alive. But, in addition to the powers under the Bankruptcy Act, 1883, I submit that the Court could order the examination of

the witnesses under Order XXXVII., rule 5, of the Rules of the Supreme Court. The present case is one of importance, and may be regarded as a test case.

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CAVE, J.:

In this case an order was made, under section 125 of the Bank- Judgment. ruptcy Act, 1883, for the administration in bankruptcy of the estate of *Richard Hewitt*, who was dead. The official receiver subsequently applied to the County Court judge, and obtained an order directing the attendance for examination of the widow and son of the deceased, and upon their non-compliance with that order, an order of commitment was made against them. The question is, whether the County Court judge had any jurisdiction to make the order requiring the attendance of the appellants. The order was made under rule 58 of the Bankruptcy Rules, 1883, that being the rule which the County Court judge considered applicable to the case, and it runs thus, "The Court may, in any matter where it shall appear necessary for the purposes of justice, make an order for the examination upon oath before the Court or any officer of the Court, or any other person, and at any place, of any witness or person, and may empower any party to any such matter to give such deposition in evidence therein on such terms (if any) as the Court may direct." This rule substantially corresponds to Order XXXVII., rule 5, of the Rules of the Supreme Court, 1883, and it is contended that this rule empowers the Court to compel any person to attend even at a time when there may be no litigation in progress. I am of opinion that rule 58 has no such operation. A survey of Order XXXVII. will be of assistance in interpreting the meaning of the rule. In the first place it provides that witnesses are to be examined *virâ voce*, unless it is otherwise ordered, and it is impossible to read this order without seeing that it applies merely to the examination of witnesses in matters in which litigation is in progress between contesting parties. This becomes conspicuously clear upon a reference to that part of the order which relates to the perpetuation of testimony, and especially upon reference to rule 37, which provides that "witnesses shall not be examined to perpetuate testimony unless an action has been commenced for the purpose." In the

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case of *Warner v. Mosses* (L. R. 16 Ch. Div. 100), JESSEL, M.R., in commenting upon the rule in question, says that it is general in terms, but that, in regard to the provisions of an Act of Parliament, the practice which the Act was intended to meet must be taken into account. "I do not," he said, "intend to cut down the generality of its terms, but it is confined to cases in which it appears necessary for the purposes of justice." Also later on he says, "I am not aware of any case in which it can be necessary for the purposes of justice that witnesses should be examined *ex parte*." I am of opinion, therefore, that this is not a power which can be exercised under Order XXXVII., rule 5. The case of *Ex parte Willey, In re Wright* (L. R. 23 Ch. Div. 118), was a case under the Bankruptcy Act, 1869, and it was there held that section 96 of that Act had no application to composition proceedings. Here the question arises with regard to section 27 of the Bankruptcy Act, 1883. Section 125 of the Act contains certain provisions which apply, with modifications, to a portion of the Act only; but it does not apply to section 27 either expressly or by implication. I do not say that it might not be convenient, in cases coming under section 125, that the official receiver should have the powers granted by section 27. We have to see, however, not that it might be convenient, but that the legislature has given these powers to the official receiver. In my opinion the legislature has not done so, and the order of the County Court judge must, therefore, be set aside.

WILLS, J.: I am of the same opinion.

Appeal allowed with costs.

Solicitors : *Jaques, Leyton & Jaques* for the appellants.

The Solicitor to the Board of Trade for the official receiver.

Cases relied upon and referred to :—

Warner v. Mosses, L. R. 16 Ch. Div. 100 ; 43 L. T. N. S. 201.

Ex parte Willey, In re Wright, 23 Ch. Div. 118 ; 52 L. J. Ch. 546 ; 48 L. T. N. S. 380.

IN RE STOCKTON AND SABISTAN, EX PARTE GIBSON.

DIVISIONAL COURT.

Bankruptcy Act, 1883, section 121—Bankruptcy rules, 1883, rule 199, sub-section (5).

Small Bankruptcy — Preliminary objection — Leave to appeal not obtained when notice of appeal given and served — Leave obtained afterwards.

BEFORE
CAVE, J.,
and
WILLS, J.
1885.

May 20.

THIS was an appeal against an order of the learned judge of the Liverpool County Court, made on March 11th last, by which it was declared that a certain deed bearing date April 23rd, 1884, was fraudulent and void and of none effect as against the official receiver as trustee.

Yate Lee for the appellant Gibson.

E. Cooper Willis, Q.C. (MacConkey with him), for the respondent.

E. Cooper Willis, Q.C.:

I have a preliminary objection. This was a small bankruptcy under section 121 of the Bankruptcy Act, 1883. With regard to the special procedure provided for small bankruptcies, rule 199, sub-section (5), of the Bankruptcy Rules, 1883, requires that "No appeal shall lie from any order of the Court, except by leave of the Court." In the case of *In re Dale, Ex parte Dale* (see *ante*, Volume II., page 92), it was recently decided by your Lordships that that rule is not *ultra vires*, and it is essential that such leave should be obtained. There is this peculiarity in the present case. The order now appealed from was made on March 11th last. Notice of appeal was given on March 28th, and served on March 31st. That was all within time. But no leave of the Court had then been obtained. When this was discovered, however, so long afterwards as April 18th the appellant went to the Court and asked that the necessary leave might be given. The learned County Court judge gave it, but gave it in these words, "So far as I have power, I will now grant you leave." Now I submit that a person is bound to get leave to enter an appeal, he cannot afterwards go and get the necessary leave.

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Yate Lee:

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Ex parte
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As a matter of fact we were wholly ignorant that the bankruptcy was one under section 121. As soon as we did know that we went and got the required leave.

CAVE, J.:

The leave appears to have been given. That being so, we do not think it advisable in the present case to refuse to hear the appeal.

*WILLS, J., concurred.**The case was then proceeded with.*

Solicitors: *T. Cray for H. Davers, Liverpool, for the appellant.*
Parkinson & Hess for the respondent.

Case referred to:—

In re Dale, Ex parte Dale (see ante, Volume II., page 92).

COURT OF
APPEAL

BEFORE THE
MASTER OF
THE ROLLS,
BAGGALLAY,
L.J.,

BOWEN, L.J.
1885.

June 19.

IN RE MILNER, EX PARTE MILNER.*Bankruptcy Act, 1883, section 4, sub-section 1 (g).**Bankruptcy Notice — Composition arrangement — Creditors preferred as inducement to sign deed.*

Where a debtor against whom no proceedings in bankruptcy had been taken entered into an arrangement with his creditors by which he agreed to pay 10s. in the pound within six years to any creditors signing the deed of arrangement and the creditors covenanted by the said deed not to sue the debtor, or to enforce any judgment already obtained, and to forego all their claims on him if the provisions of the deed were carried out: which deed was signed by a creditor who had previously obtained a final judgment against the debtor: and after such creditor had signed three other creditors signed the deed, who it was subsequently discovered, had received

from the debtor's brother, with the knowledge of the debtor, certain other payments over and above the 10s. in the pound secured by the deed.

Held: That the principle laid down in the case of *Daughish v. Tennent* (L. R. 2 Q. B. 49) applies to all composition deeds whether under a statute or not: that it is an implied condition in all such deeds that all the creditors shall come into the arrangement on perfectly equal terms: and that the order of the registrar refusing to set aside a bankruptcy notice served upon the debtor by the creditor who had obtained a final judgment was a right order, such creditor being no longer bound by the deed.

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IN RE
MILNER,
EX PARTE
MILNER.

THIS was an appeal from an order of Mr. Registrar *Hazlitt* dismissing an application made on behalf of the debtor to set aside a bankruptcy notice.

The case raised an important point as to the validity of a deed made for the benefit of creditors.

The debtor *Milner* carried on business as a surgeon, and in October, 1884, he called a meeting of his creditors at which certain of the creditors, including one *Townend*, came to an arrangement with the debtor and passed resolutions to the effect that the debtor should pay 10s. in the pound within six years to any creditors signing the deed of arrangement, and the creditors covenanted by the deed not to sue the debtor or to enforce any judgment already obtained, and to forego all their claims on him if the provisions of the deed were carried out. The creditor *Townend*, who had previously obtained a final judgment against the debtor, signed the deed. After he had signed, certain other creditors also signed the deed; but it was subsequently discovered by *Townend* that they had received as an inducement to do so from a brother of the debtor, with the debtor's knowledge, certain other payments over and above the 10s. in the pound secured by the deed.

The creditor *Townend* thereupon, notwithstanding the execution of the deed, issued and served a bankruptcy notice against the debtor.

An application made to Mr. Registrar *Hazlitt* to set aside this notice having been refused, the debtor *Milner* now appealed from that refusal to this Court.

E. Cooper Willis, Q.C. (F. C. Willis with him) for Milner.

The creditor *Townend* said that after what had occurred he was

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no longer bound by the deed. But none of the money paid by the brother came out of the estate. In the case of *Carey v. Barrett* (L. R. 4 C. P. Div. 379), "At a meeting of the defendant's creditors, the following agreement, to which the plaintiff was an assenting party, was made and signed by all the creditors present:— 'We, the undersigned creditors of W. B., in consideration of 10s. in the pound on our respective debts set opposite to our respective names, hereby agree to accept the same in discharge of our said debts, on the understanding that no concealment or fraud has been practised by the said W. B.: the whole of the creditors receiving not exceeding a like sum in discharge of their debts.' At the time of entering into this agreement, it was known that the debtor was being sued in a County Court by one P., as executor of a creditor for a small sum which was afterwards paid in full the day before the cause was ripe for trial. It was held that the agreement was limited to the creditors signing it; and that even if it were not so, the payment to P. being made under pressure, and not in pursuance of a prior arrangement to give him a preference, did not render the transaction void." And in giving judgment in that case Lord COLERIDGE said—"I do not pretend to say that this is by any means a clear instrument. . . . It is a document whereby certain creditors of Barrett (whose claims amount in the aggregate to a considerable sum) agree to take 10s. in the pound in discharge of their debts. They grant the debtor a release 'on the understanding that no concealment or fraud has been practised by Barrett.' Then come these words, 'the whole of the creditors receiving not exceeding a like sum in discharge of their debts.' The real question is whether the meaning of the document is that *no* creditor is to receive more than 10s. in the pound, whether party to the arrangement or not. I agree that, if that were the true interpretation, the voluntary payment to any one of them of more than the stipulated sum would be a fair ground for impeaching the agreement. I am not aware of any distinct authority for it; but I believe that the general understanding of the profession has been that a payment in excess made afterwards will not avoid the composition, unless made in pursuance of a previous understanding. It seems to me that to construe the concluding words of the memorandum to refer only to those creditors who sign it will be giving it

a sufficient sense. The creditors who are assenting parties may very well agree to relieve the debtor of half their debts, provided it be understood that no signatory shall receive a larger dividend than the rest. The plaintiff seeks to impeach the transaction because the executor of Powell who had a small claim against Barrett, had sued him in the County Court, and the case being on the eve of trial, the debtor, having no defence, paid the debt. . . . Is this such a payment as vitiates the agreement? If the stipulation at the end means *all* the creditors we need not discuss it. I think fairly read it means all us signatories. It may fairly mean, no creditor shall by virtue of this agreement receive more than 10*s.* in the pound. Pink's demand was not satisfied under and by virtue of the agreement. . . ." In the present case can it be suggested that anybody might have gone to these creditors and said he would pay the whole of the debt, and that would have been a fraud on the part of the debtor. The debtor himself could not have taken the money out of the estate.

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Herbert Reed for the creditor Townend :

The whole matter as to these payments was kept in the dark. In an arrangement of this kind there must be perfect good faith. If one of the creditors who signs the deed receives more than the others, that is a fraud. A composition deed is a deed whereby each of the creditors agrees to give up a certain part of their debts. If one creditor makes a secret bargain that is a fraud on the other creditors. Here there was a secret arrangement. Four persons who signed the deed were paid by Mr. *Bird*, a solicitor, with the consent of the debtor *Milner*, out of the money of the debtor's brother.

[THE MASTER OF THE ROLLS. If so how were the creditors injured ?]

It is not necessary to show that the payments go to diminish the assets. In the case of *Knight v. Hunt* (5 Bing. 482), "The plaintiff had refused to sign an agreement to receive of his debtor a composition of 10*s.* in the pound; but the debtor's brother offering to supply him with coal to the amount of the other 10*s.*, he signed the composition agreement. The other creditors knew nothing of

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the coal transaction. Plaintiff having been supplied with the coals it was held that he could not recover upon a promissory note for the amount of the 10*s.* composition." And in giving judgment in that case, BEST, C.J., said . . . "These agreements for composition with creditors require the strictest good faith. If I see a man, acquainted with the circumstances of the debtor, agreeing to sign a paper under which he is to be satisfied with 10*s.* in the pound, I conclude he has exercised a judgment on the subject. Am I not cheated if he procures another to give him 10*s.* more? Perhaps there is no case exactly like this; but as no two cases are ever alike in all respects, the best way is to extract a principle from analogous decisions, and the principle to be extracted from all the cases on this subject is, that a man who enters into an engagement of this kind is not to be deceived. It has been argued that here the debtor was not injured nor the funds for other creditors rendered less available. No doubt these topics have been urged in some of the cases; but one question always is: Whether the judgment of the creditors has been influenced by the supposition that all are to suffer in the same proportion? That was the case here." The assent of each creditor is the consideration for the assent of the others. [Counsel also referred to the case of *Mallalieu v. Hodgson* (16 Q. B. R. 689), and the judgment of ERLE, J., there.] In the case of *Daughish v. Tennent* (L. R. 2 Q. B. 49), also in which the question of a composition deed was considered, COCKBURN, C. J., said: "In order that such a deed should be binding on the creditors, it is essential that there should be the most perfect good faith between the debtor and all his creditors. It is very true that it does not appear that the preference is to be obtained from the assets, or that all the creditors will not receive an equal distribution of the assets; but it is a wrong ground to rest the validity of a composition deed upon, to say that the creditor looks only to the equal distribution of assets. There may be cases in which a man might not be capable of deciding for himself whether he would accept the composition, and would rather trust to the judgment of a body of creditors than to his own, whether it was advisable for him to execute the deed; and he is entitled by the agreement into which he enters to insist that the concurrence of the other creditors shall have been obtained by fair means; and if it were obtained by

a promise from the debtor to give something more to some creditors than to others, the deed would be fraudulent and void, as between the debtor and the other creditors who were no parties to the arrangement."

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[THE MASTER OF THE ROLLS: That was a composition in a bankruptcy].

In this case there were three persons who signed the deed after receiving a preference. I would also refer to what is said by Mr. Robson in his Bankruptcy Practice, 4th ed., p. 248. He says, "It is essential for the validity of a composition between a debtor and his creditors that it should be *bond fide*, and for the equal benefit of all the creditors, and that all should be placed on an equal footing; and, therefore, if one creditor makes a secret bargain for an additional sum or security for himself as the condition of his accepting the composition, such bargain will not only be absolutely void, but it will entitle the other creditors to set aside the composition and resort to their original debts; and the debtor may recover back any sum so paid. The validity of the composition, however, will not be affected by a compulsory payment to a creditor under legal proceedings, known to be pending at the time of the composition arrangement." And then the reference is given to the case of *Carey v. Barrett*, which has been cited by my friend. In the present case the arrangement clearly was that everybody who came in under the deed should share equally. What I submit, therefore, is this, that at common law a composition deed is one whereby each creditor agrees to suffer in the same proportion, the assent of each creditor being the consideration for the assent of the others, and if a creditor gets any preference which is not disclosed, the whole agreement fails on the ground of fraud, even though the preference does not accrue out of the assets of the debtor.

THE MASTER OF THE ROLLS (BRETT):

In this case the debtor is indebted to many creditors, and, irrespective of any petition in bankruptcy, an arrangement was entered into between him and certain creditors who met together that those creditors, and any who might adopt what they had done by signing

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a deed, would take 10*s.* in the pound. That arrangement was to be carried out by a deed. The question is, what is the effect of the deed as to the creditors, and as to the debtor and the creditors who do sign it. It is clearly proved by the evidence in this case that the creditor *Townend* entered fairly into the arrangement. He was not induced by any fraudulent representation before he signed it. Afterwards, however, two or three creditors did sign; but only because the debtor's brother agreed to pay, and paid a certain part of their debts in order to induce them to sign the deed. Thereupon they signed. The creditor *Townend* subsequently became aware of that, and he now submits that, in consequence of those creditors having so signed with the knowledge of the debtor, the whole deed becomes a void deed. It does not seem to be denied that, if the deed was made under a statute, such a transaction would void the deed. Now we have to decide if it does so in a composition deed at common law. There are two points. First, if the money had been paid by the debtor himself: and then, if it is paid by the debtor's brother, with the consent of the debtor. As between the creditors and the creditors, and the debtor and the creditors, the debtor implies that all the creditors shall come in equally; it becomes an implied condition of the deed; and if there is a breach the deed becomes voidable to all the creditors who have signed. That equally applies to a deed made outside or under a statute. If it applies to one it must apply to the other. In the case of *Dauglish v. Tennent* (L. R., 2 Q. B. 49), Mr. Justice MELLOR said, "This is a deed of arrangement voluntarily made between the debtor and certain creditors, the effect of which is said to be to release the debtor from his debts. To put the case on a broad ground, it is an agreement between the debtor and each creditor that they are contracting on terms of equality as to each and all, and if by a secret bargain some creditors have an advantage over other creditors, it is a fraud upon those who must be presumed to have signed the deed upon the understanding that all the creditors should be placed upon the same footing." And Mr. Justice LUSH said, "It must be taken that every creditor who signed the deed stipulated for good faith between the debtor and the whole of the creditors, and that the release was only to take effect if and when the requisite majority of the creditors should have *bond fide* executed the deed; and if

the execution of such was obtained by bribery, then it is not such an execution of the deed as was contemplated." I add to that good faith as between the creditors themselves. The other creditors would not enter into the arrangement unless it was understood that there was absolute equality. In the case of *Cockshot v. Bennett* (2 T. R. 763), where all the creditors of an insolvent consented to accept a composition for their respective demands upon an assignment of his effects by a deed of trust to which they were all parties, and one of them, before he executed, obtained from the insolvent a promissory note for the residue of his demand by refusing to execute until such note was made, it was held that the note was void in law, as a fraud on the rest of the creditors. And Lord KENYON said, "The foundation of my opinion is, that the temptation to give this note was a fraud on the creditors who were parties to the contract on which their debts were to be cancelled in consideration of receiving a composition. The note preceded the execution of the deed; all the creditors, being assembled for the purpose of arranging the defendant's affairs, they all undertook and mutually contracted with each other that the defendants should be discharged from their debts after the execution of the deed. Then these plaintiffs, in fraud of that engagement, entered into a contract with the defendants, which prevented their being put in that situation which was the inducement to the other creditors to sign the deed, and to relinquish a part of their demands." The creditor only signs in the belief that all the creditors will be equal, and if this is not so the creditor who has signed is deceived. Whether the creditor who gets the money, gets it from the debtor or from some one else, the other creditor is deceived. I should hesitate to say, however, that this would apply as against the debtor if it was done without the debtor's knowledge and assent. But if the debtor does know and consent it can make no difference. I am of opinion, therefore, that the creditor *Townend* was justified in saying that the deed was voidable against him, and that he was entitled to do what he has done.

BAGGALLAY, L.J.:

The question is whether this deed is impeachable or not. From the earliest times the acceptance by a creditor of a sum

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larger than that given to him by the deed invalidated the whole transaction. I am of opinion that the principle laid down in the case of *Dauglish v. Tennent* (L. R. 2 Q. B. 49) applies to this case. I am satisfied that this deed was brought about by certain creditors receiving more than was given to them by the deed, and that it was done with the knowledge of the debtor. The order of the registrar was perfectly right.

BOWEN, L.J.:

By a composition deed each creditor agrees to forego a part of his debt. All those who take part in the composition scheme enter into it in the belief that they come in on a principle of equality, and that no private bargain exists. If there is a secret agreement it is a breach of faith, and for a debtor to know of such a breach of faith and not to disclose it, is a fraudulent transaction which strikes at the very root of the deed.

Appeal dismissed with costs.

Solicitors: *Bird & Moore* for the appellant Milner.
Ross & Co. for Townend.

Cases relied upon or referred to:—

Carey v. Barrett, L. R. 4 C. P. Div. 379.

Knight v. Hunt, 5 Bing. 432; 3 M. & P. 18.

Mallalieu v. Hodgson, 16 Q. B. R. 689; 20 L. J. Q. B. 339; 15 Jur. 817.

Dauglish v. Tennent, L. R. 2 Q. B. 49; 96 L. J. Q. B. 10; 8 B. & S. 1.

Cockshot v. Bennett, 2 T. R. 763.

PRACTICE.

IN RE WATSON & SMITH, EX PARTE ORAM.

COURT OF
APPEAL.*Bankruptcy Act, 1883, Section 7, sub-section (3).*BEFORE THE
MASTER OF
THE ROLLS,
BAGGALLAY,
L.J.,
BOWEN, L.J.
1885.

June 19th.

Petition—Prior arrangement between the Debtor and the Creditors—Adjournment
—“Sufficient Cause.”

Held: (1) That the fact that, before the presentation of a bankruptcy petition against a debtor, a large number of the creditors have assented to a deed of arrangement, is not a “sufficient cause” within the meaning of section 7, sub-section (3) of the Bankruptcy Act, 1883, for dismissing such petition presented by a dissenting creditor, however beneficial to the creditors the terms of such arrangement may be: and that, in consequence, there is no jurisdiction to adjourn generally the hearing of such petition with a view to its ultimate dismissal if the arrangement should be found to work well.

(2) The case of *In re Dixon & Wilson, Ex parte Dixon & Wilson* (see *ante*, Volume I., page 98), approved and explained to the effect that the decision there did not depend upon the particular terms of the arrangement, but upon the fact that such arrangement was made at the time, and in the manner, and by the persons by whom it was made.

THIS was an appeal from an order of Mr. Registrar PEPYS, adjourning generally the further hearing of a bankruptcy petition presented by one *Oram* against the debtors *Watson & Smith*, with liberty to apply.

At the time when the petition was presented the debtors admitted the petitioning creditor's debt, and also the act of bankruptcy, but it appeared that they had shortly before executed out of Court a deed of arrangement with a large number of their creditors. To this deed *Oram* had not assented.

It was urged, however, that the arrangement so entered into would be much more beneficial to the creditors than a bankruptcy, and the registrar in consequence made an order adjourning the petition for the purpose of seeing how the proposed arrangement would work.

From this decision, *Oram*, the petitioning creditor, now appealed.

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Herbert Reed for the appellant.

The Registrar professed to act under section 7, sub-section (3), of the Bankruptcy Act, 1883, which provides that "If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition." It was said that this arrangement came within the words "other sufficient cause." But in the case of *In re Dixon & Wilson, Ex parte Dixon & Wilson* (see *ante*, Volume I., page 98), it was held by the Court of Appeal more than a year ago "That the fact that a large majority in number and value of the creditors of a debtor have assented to a deed assigning to trustees, all the debtor's property for the benefit of his creditors generally, is not a 'sufficient cause' within the meaning of section 7, sub-section (3) of the Bankruptcy Act, 1883, for dismissing a petition for a receiving order against the debtor presented by a dissenting creditor even for a small amount; such receiving order being founded on the act of bankruptcy committed by the execution of the deed." And further, that "it is the intention of the legislature that proposals for a composition or scheme of arrangement shall only be entertained after a receiving order has been made." The arrangement offered is not an equitable one. The hands of the creditors are tied by the proposed deed. The debtor escapes all public examination. This is a method of getting the scheme carried without investigation and without the consent of certain of the creditors. There is no power of general adjournment to the prejudice of the creditors.

Upjohn, for the debtors.

The Registrar said that the deed in this case was for the benefit of the creditors. The deed here is so different from the deed in the case of *In re Dixon & Wilson*, that that case does not apply to the present. There is no release of the debtors from their debts. There is only a covenant not to sue. The Registrar said that under the sub-sections (2) and (3) of section 7 of the Bankruptcy Act, 1883, he had a discretion and he exercised it as he thought

fit. This is not a scheme to liquidate the debtors' affairs. It is a scheme that the debtors shall pay 20s. in the pound within a limited period. In the case of *In re Dixon & Wilson*, the creditors gave up all their safeguards and got no benefit they would not have got in bankruptcy. In this case they only give up the safeguards for a time and get great benefits.

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F. C. Willis, appeared for the trustees under the said deed of arrangement, but it was decided that he had no *locus standi* to entitle him to address the Court.

THE MASTER OF THE ROLLS (BRETT).

In this case a creditor applied for a receiving order against the Judgment debtors, and the only objection urged against such receiving order being made is that an arrangement of the debtors' affairs has been agreed to by a certain number of their creditors. That is the only objection. The registrar heard the case and did not adjourn the case for further materials, or evidence, or even argument of which doubtless he had heard sufficient, but he did adjourn it *sine die* by way of decision in order to see whether the arrangement made by the creditors would work well. In that he was taking the first step to dismiss the petition under section 7, sub-section (3), of the Bankruptcy Act, 1883. It follows, therefore, that we must inquire whether this arrangement made by some of the creditors is a "sufficient cause" under this sub-section (3). Unless it is so the registrar had no authority so to deal with the matter. The case decided on that question is that of *In re Dixon & Wilson, Ex parte Dixon & Wilson* (see *ante*, Volume I., page 98). In that case the Lord Justice BAGGALLAY, who is sitting here to-day, said, "We have to consider whether the execution of such a deed and the assent of the majority of the creditors is such other sufficient cause as to justify the Court in refusing to make a receiving order. In my opinion in deciding this question we ought to look at the whole scope of the Act. . . . The clear object of the Act is, that the proposal for a composition or scheme should take place after a receiving order is made. . . . To say that, outside the Act, and in lieu of a receiving order being made, with all the security conse-

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quent upon it, an arrangement of the kind proposed should be sanctioned, appears most unwise. In my opinion it would be utterly contrary to the whole scope of the Act if a majority of creditors could prevent a receiving order being made by saying that they would accept an arrangement of this kind. It would open a door to fraud, which, if the proceedings were more open, could not take place." The reasons on which the Lord Justice came to that conclusion in that case were not founded on the particular facts of the arrangement, but because it was made at the time and in the manner and by the persons by whom it was made. So also Lord Justice COTTON, after dealing with the provisions of some of the old Acts relating to bankruptcy, said, "Now under the new Act the tendency of the Act is even still more strict. It allows a composition or arrangement, indeed, but with still greater restrictions. It imposes on the Court the duty of sanctioning such arrangements —in my opinion a most wise provision. The Court is to take care that such arrangement is beneficial for the creditors, and the duty is imposed upon it of saying whether the resolutions which the statutory majority of creditors may have approved are such as ought to receive its sanction. In my opinion, in an Act of this restrictive tendency, it would be most extraordinary, where no mention is made in the Act with respect of a deed of this nature, except that it shall be an act of bankruptcy, if such a deed thus made outside the Court and outside the bankruptcy could be approved. It would be entirely contrary to the object of the Act." Then Lord Justice LINDLEY adds, "When we find in the Act most careful rules laid down for carrying out the very thing the deed would do, and we are asked to set aside the scheme provided in the Act, and assent to another, I am clearly of opinion that if we did assent to such a course we should be acting contrary to the principle on which Acts of Parliament ought to be construed." I say distinctly, therefore, that to my mind the case of *In re Dixon & Wilson* is a conclusive authority that the existence of an arrangement, whether beneficial or not, made at the time and in the manner and by the persons by whom this was made, affords no ground for a registrar to order an adjournment, for the purpose that the adjournment was ordered in this case. I differ from the view taken by the Registrar and the appeal will be allowed.

BAGGALLAY, L.J.

I only wish to say that I have carefully considered the report of the case of *In re Dixon & Wilson*, and the judgment I gave in that case, and that I entirely adhere to it.

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BOWEN, L.J.:

I am of the same opinion, and I have nothing to add.

Appeal allowed with costs.

Solicitors: *Walker, Son, & Field*, for the appellant.

G. Davis, Son, & Co., for the debtors.

Case relied upon and affirmed:—

In re Dixon & Wilson, Ex parte Dixon & Wilson. See *ante*, Volume I., page 98, L. R. 18 Q. B. D. 118.



JURISDICTION.

IN RE HOME, EX PARTE EDWARDS.

COURT OF
APPEAL.

BEFORE THE
MASTER OF
THE ROLLS,
BAGGALLAY,

L.J.,
BOWEN, L.J.,

1885.

June 19th.

Delegation of Judge's authority—Jurisdiction of Registrar—Pending Business.

Appeal from an order of the Registrar the effect of which was to set aside as against the trustee in a bankruptcy under the Bankruptcy Act, 1869, a post-nuptial settlement executed by the bankrupt.

Objection. That under the provisions of the Bankruptcy Act, 1883, the Registrar had no jurisdiction to make the order.

Held: (1) That the jurisdiction which the registrars in bankruptcy had by delegation or otherwise, under the Bankruptcy Act, 1869, is preserved to them in respect of pending proceedings by section 169, sub-section (3), of the Bankruptcy Act, 1883.

(2) That Rule 264 of the Bankruptcy Rules, 1883, which provides for the exercise of their jurisdiction is not *ultra vires*, and is properly framed

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for the purpose of carrying out the intention of the legislature with regard to pending proceedings.

In re Evan Jones (see *ante*, Volume I., Page 17), approved and confirmed.

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HIS was an appeal from an order of Mr. Registrar *Brougham*, the effect of which was to set aside as against the trustee in bankruptcy of *Home*, a post-nuptial settlement executed by the bankrupt.

The real question in dispute was whether the Registrar had any jurisdiction to make the order.

The deed of settlement in question was executed on February 16th, 1883.

On November 21st, 1883, *Home* was adjudicated bankrupt under the Bankruptcy Act, 1869, and on December 28th, 1883, the trustee in the bankruptcy was appointed.

On July 18th, 1884, notice of motion to declare the settlement void was served by the trustee in the bankruptcy upon the trustees of the settlement, of whom the appellant *Edwards* was one, upon which the order was appealed from was subsequently made by the Registrar.

E. Cooper Willis, Q.C. (F. C. Willis with him), for the appellant.

The learned Registrar had no power in himself to decide the question at all. The only person who could decide this question was the judge. Section 94 of the Bankruptcy Act, 1883, provides for the transaction of bankruptcy business by a special judge of the High Court. And by Section 99 the jurisdiction in bankruptcy of the Registrars is particularly defined. Under the Act of 1869 the Registrar would have acted as delegate of the Chief Judge. Now that there is no Chief Judge he cannot act as a delegate.

[THE MASTER OF THE ROLLS. You are putting a strained meaning on the word delegate. It only means sending it to him. The Judge does not appoint or dismiss the Registrar.]

It is true that by section 169, sub-section (8) of the Bankruptcy Act, 1883, "Notwithstanding the repeal effected by this Act, the

proceedings under any bankruptcy petition, liquidation by arrangement, or composition with creditors under the Bankruptcy Act, 1869, pending at the commencement of this Act shall, except so far as any provision of this Act is expressly applied to pending proceedings, continue, and all the provisions of the Bankruptcy Act, 1869, shall, except as aforesaid, apply thereto, as if this Act had not passed." And by Rule 264 of the Bankruptcy Rules, 1883, "In any proceeding commenced under the Bankruptcy Act, 1869, or any previous Bankruptcy Act, a Registrar shall, unless and until the judge otherwise orders, continue to have and exercise all powers and jurisdiction (not otherwise provided for by the Act or these rules), which he had by delegation or otherwise at the commencement of these rules." But I say that this Rule 264 goes much further than the section 169, sub-section (3). The matter ought to be disposed of by the judge.

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[THE MASTER OF THE ROLLS. Surely the plain meaning is that all these things pending shall go on as they were before, but that Mr. Justice CAVE is substituted for Chief Judge BACON.]

My contention is that the registrar had no jurisdiction to make the order he did under the Bankruptcy Act, 1883. The delegated authority from the Chief Judge in bankruptcy, which he would have had under the Act of 1869 no longer exists. I submit further that the Rule 264 is *ultra vires*.

Douglas Walker (Pollard with him), for the trustee in the bankruptcy, was not called on.

THE MASTER OF THE ROLLS (BRETT):

The real question in this case is whether the Registrar had judgment, jurisdiction to make the order he has made. I have not the slightest doubt that he had jurisdiction. If I take section 169, sub-section (3) of the Bankruptcy Act, 1883, by itself, the meaning is quite plain. It is a plain preservation of everything, and everything is to go on in the old way. Then I see that in the case of *In re Evan Jones* (see *ante*, Volume I., Page 17), where this point was taken before Mr. Justice MATTHEW, sitting for the Bankruptcy

1885. Judge, that learned judge said, "I think that section 169 is the governing section, and furnishes the key to the interpretation of the Act. . . . It appears to have been the intention of the legislature that the jurisdiction of the Registrars with reference to proceedings pending under the Act of 1869 should be maintained, and that such pending proceedings should go on as formerly. Rule 264 has been framed for the purpose of carrying out that intention." I am just of the same opinion, and that Rule 264 has been properly framed, and is not *ultra vires*. The order of the Registrar must stand.

BAGGALLAY, L.J., and BOWEN, L.J., concurred.

Appeal dismissed with costs.

Solicitors : G. S. Hall for the appellant.

Lyne & Holman for the trustee.

Case referred to :—

In re Evan Jones. See ante, Volume I, Page 17.

DIVISIONAL
COURT.

BEFORE
CAVE, J.,
^{and}
A. L. SMITH, J.
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IN RE JOHNSTONE, EX PARTE SINGLETON.

Bankruptcy Act, 1883, sections 21, 22 (9), 54 (1), 57 (8), and section 140.
Powers of Official Receiver—Compromise—Sanction of the Board of Trade—Certificate under section 140, sub-section (2) of the Bankruptcy Act, 1883—Costs.

*June 16th,
17th, and 23rd.* THIS was an appeal on behalf of Mr. Singleton, the trustee in the bankruptcy of J. A. Johnstone, against an order of the learned judge of the Barnet County Court, dismissing, with costs, an application of the said trustee to set aside a compromise entered into by the Official Receiver of the Barnet district, in connection with the said bankruptcy.

On December 4th, 1883, the debtor, Johnstone, who occupied

the Red Lion Hotel, Barnet, executed a bill of sale in favour of a Mr. *Evershed*; and on April 23rd, 1884, a further bill of sale in favour of a Mr. *Head*, and it was in reference to these two documents that the present dispute arose.

On May 6th, 1884, *Johnstone* presented his own petition, upon which a receiving order was made, and on May 7th, Mr. *Stoneham*, the official receiver for the district, took possession of the debtor's property.

On May 23rd, at the adjourned first meeting of the creditors, a proposal was made by the debtor to pay a composition of 2*s.* 6*d.* in the pound, which was then assented to by the creditors; but at the adjourned public examination held on June 18th, Mr. *Stoneham*, the official receiver, expressed his intention of opposing the composition and also of disputing the two bills of sale given to *Evershed* and *Head*.

The official receiver was thereupon approached by Mr. *Evershed* and Mr. *Head* with a view of a friendly settlement, and eventually a compromise of all litigation was agreed upon on payment of £500.

On June 27th, 1884, a further meeting of the creditors was held, at which the official receiver laid before the meeting the proposed compromise with the bill of sale holders, but this was objected to by the creditors, and resolutions were passed in favour of bankruptcy.

On June 30th, however, an arrangement in writing was entered into by the official receiver with Messrs. *Evershed* and *Head* which was carried into effect on July 8th in the following terms:—“*COMPROMISE. Received from Messrs. Dalton & Co., Solicitors, the sum of £475, which, with £25 received from Mr. Head, makes up the sum of £500 for which I have agreed to sell all my interest in two bills of sale * * * * &c.*”

On July 9th, 1884, the debtor *Johnstone* was adjudicated bankrupt, and thereupon, on July 11th, a letter was sent by the official receiver to Messrs. *Dalton & Co.*, confirming the compromise arrangement previously made.

On July 23rd the certificate of approval of Mr. *Singleton*, as trustee in the bankruptcy, was granted by the Board of Trade, and an application was subsequently made by that gentleman to the County Court to set aside the compromise.

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1885. This application was dismissed with costs by the learned
IN RE County Court Judge on the ground that the official receiver had
JOHNSTONE, acted perfectly *bonâ fide* in the matter, and from this decision the
EX PARTE trustee now appealed.
SINGLETON.

E. Cooper Willis, Q. C. (Macaskie with him), for the trustee in
the bankruptcy.

Muir Mackenzie for the official receiver.

Yate Lee for Mr. Head.

Etherington Smith for Mr. Evershed.

E. Cooper Willis, Q.C.

I say that the official receiver could not make the arrangement he did. Section 21 of the Bankruptcy Act, 1883, provides for the appointment of a trustee which must be certified by the Board of Trade. Section 22 deals with the appointment of a Committee of Inspection, and by sub-section (9) of section 22, "If there be no committee of inspection, any act or thing or any direction or permission by this Act authorised or required to be done or given by the committee may be done or given by the Board of Trade on the application of the trustee." Then by section 54, sub-section (1), "Until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee." And by section 57, "The trustee may, with the permission of the committee of inspection, do all or any of the following things: (8) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person, or by the trustee on any person." There is no evidence here that what has been done received the sanction of the Board of Trade. The official receiver *before* adjudication entered into a compromise which stifled all claims with respect to these bills of sale. The official receiver had no power before adjudication to compromise at all. The decision in the case of *In re Parker and Parker, Ex parte the Board of Trade* (see *ante*, page 158) was after adjudica-

tion. There it was held "That before the appointment of a trustee by the creditors the official receiver, who is by section 54 of the Bankruptcy Act, 1883, the trustee for the purposes of that Act until a trustee is appointed, has power after an adjudication in bankruptcy has been made against a debtor, to exercise the powers given by section 56 of the Act to the trustee. Such official receiver, therefore, may sell the property of the bankrupt." If the official receiver could sell before adjudication there would be no power or ability for the creditors to accept a composition or scheme of arrangement. He cannot make, it may be, a clean sweep of the whole estate before adjudication. Here the official receiver was trustee from July 9th, when adjudication took place, to July 23rd when *Singleton* was appointed. On June 27th, before any adjudication, the official receiver came to the meeting and laid before the creditors the proposed compromise, and then in spite of their objections, he carried it through. The position of the official receiver is simply this. He is the receiver and manager appointed by the High Court until the estate is vested in him by adjudication. But further, beyond all this, this arrangement was called a compromise which even a trustee could not carry out without the sanction of the Board of Trade when no committee of inspection is appointed.

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Muir Mackenzie for the official receiver:

The official receiver had the custody of this property from May 7th to July 9th. The legal estate was vested in him as trustee from July 9th to July 23rd. In that time he accepted the offer made, for he specifically confirmed after adjudication the arrangement entered into.

[CAVE, J.: That may be, but by section 57 he must have the consent of the Board of Trade, and the permission must not be a general permission, but a permission to do a particular thing in a specified case.]

By Rule 250 of the Bankruptcy Rules, 1883, "Where there is no committee of inspection, any functions of the committee of

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inspection which devolve on the Board of Trade may, subject to the directions of the Board, be exercised by the official receiver."

[A. L. SMITH, J.: But have there been any directions of the Board within this rule? That must surely be shown. If the official receiver is not present the case had better be adjourned for him to be called.]

June 17th.

[Mr. Stoneham, the official receiver, was called and examined. He said, "I consulted the Board of Trade on the subject of the compromise. I consulted several officials. Mr. Hough first, who referred me to Mr. Smith, the Inspector-General in Bankruptcy. I discussed the matter at length with the Inspector-General and he approved it. *Cross-examined.*—I cannot say when I first went up to the Board of Trade about this compromise. I went up more than once, both before and after I received the £475."]

E. Cooper Willis, Q.C.:

I submit that there is no evidence of any sanction of the Board of Trade at the time when the Board could give it. The Inspector-General could not put the seal of the Board to papers which ought to come before the Board. Section 140 of the Bankruptcy Act, 1883, provides that, "(1) All documents purporting to be orders or certificates made or issued by the Board of Trade, and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorised in that behalf by the President of the Board, shall be received in evidence, and deemed to be such orders or certificates without further proof, unless the contrary is shewn. (2) A certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade, shall be conclusive evidence of the fact so certified." But the consent could not be given by merely going up and talking the matter over with an official.

[A. L. SMITH, J.: Let the Board of Trade supply us with a certificate under section 140, sub-section (2).]

June 23rd.

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Your Lordships desired a certificate under section 140, subsection (2). It is here.

Certificate given pursuant to section 140, subsection (2), of the Bankruptcy Act, 1883.

Whereas Mr. Allen Stoneham, the Official Receiver for the district of the County Court of Barnet, applied to the Inspector General in Bankruptcy for the permission of the Board of Trade to proceed with and carry out a compromise with the holders of securities over the property of one J. A. Johnstone, a bankrupt. And whereas the said Inspector General in Bankruptcy gave to the said Official Receiver directions and permission to proceed with and carry out such compromise. Now, therefore, I, the Right Honourable Joseph Chamberlain, President of the Board of Trade, hereby certify that the directions and permission given by the said Inspector General to the said Official Receiver to proceed with and carry out the said compromise, were the directions and permission of the Board of Trade.

Dated the 18th day of June, 1885,

J. CHAMBERLAIN,

President of the Board of Trade.

E. Cooper Willis, Q.C. :

I notice that there is no date when the permission was given by the Inspector-General.

[CAVE, J.: Surely that is immaterial?]

No. The Board of Trade could only give permission as the committee of inspection. A committee of inspection could not have given permission until after adjudication. If the permission was given before it would be of no effect. The certificate not possessing any date cannot legalise what may have been illegal. The Board of Trade must show that at the time when the permission was given it had power to give permission as a committee of inspection.

CAVE, J.:

I am of opinion that the official receiver as trustee had power Judgment, to make this compromise. It was in truth arranged before adjudi-

1885. cation, but it was specifically confirmed afterwards. A transaction of this kind must be carried out with the permission of the Board of Trade, and it seems now to have been made clear to us that the necessary permission was given.

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A. L. SMITH, J.:

I am of the same opinion. The certificate read to us says that the official receiver had "directions and permission to carry out such compromise," and that such directions and permission "were the directions and permission of the Board of Trade." The official receiver, therefore, had authority to do what he did.

Yate Lee:

I ask that the appeal may be dismissed with costs.

CAVE, J.:

In this case the appellant trustee has failed, and so far as the bill of sale holders are concerned I am of opinion that they ought to have their costs. The costs ought not, in my opinion, to come out of the estate, but the trustee must pay the costs of the bill of sale holders out of his own pocket. As to the view taken by the learned County Court Judge in the Court below that the trustee should pay the costs there out of his own pocket, I cannot see that the learned judge acted wrongly, and I see no reason for interfering with that decision in the Court below. The only remaining costs are the costs of the official receiver. With regard to those I take a different view. Until compelled to come and say he had the necessary permission, the official receiver for some reason or another kept away. We were obliged in consequence to sit here for two days to hear arguments which might have been avoided, and to give adjournments for his attendance. As to the official receiver, the case will be dismissed, but without costs.

A. L. SMITH, J., concurred.

Appeal dismissed with order as to costs accordingly.

Solicitors: *Taylor, Hoare, & Taylor*, for the appellant trustee.
The Solicitor to the Board of Trade, for the official receiver.

1885.
 IN RE
 JOHNSTONE,
 EX PARTE
 SINGLETON.

Case referred to:—

In re Parker & Parker, Ex parte the Board of Trade. See *ante*, page 158.

IN RE WOLSTENHOLME, EX PARTE WOLSTENHOLME. DIVISIONAL COURT.

Bankruptcy Act, 1883, Section 4, subsection 1 (h).

Act of Bankruptcy—Notice of suspension of payment of debts.

BEFORE
 CAVE, J.,
 and
 A. L. SMITH, J.
 1885.
 June 23rd.

Where two circulars were sent out by the solicitors of the debtor to the creditors, calling a meeting of the creditors, and laying before them the position of the debtor, and further stating that by the kindness of friends, and by raising money upon his furniture, such debtor might be enabled to pay 10s. in the pound, provided all the creditors would accept it to save bankruptcy proceedings, but that if all the creditors would not agree, there was no alternative but to seek the protection of the Court.

Held: That such statements amounted to a notice by the debtor "that he has suspended or that he is about to suspend payment of his debts," so as to constitute an act of bankruptcy under section 4, subsection 1 (h) of the Bankruptcy Act, 1883.

THIS was an appeal on behalf of the debtor *J. H. Wolstenholme* to set aside a receiving order which had been made against him by the learned judge of the Carnarvon County Court.

The question in the case was whether two circulars sent out by the solicitor of the debtor to the creditors constituted an act of bankruptcy under section 4, sub-section 1 (h) of the Bankruptcy Act, 1883, which provides that an act of bankruptcy shall be committed, "If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend payment of his debts."

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Ringwood for the debtor :

IN RE
WOLSTEN-
HOLME,
EX PARTE
WOLSTEN-
HOLME.

I submit that no act of bankruptcy had been committed, and the receiving order ought not to have been made. The debtor *Wolstenholme* was a partner in the firm of *Ainsworth & Co.*, carrying on business as auctioneers and valuers at Rhyl. In 1884 the partnership was dissolved, and Mr. *Wolstenholme* took over the debts of the company. The first circular upon which the act of bankruptcy is founded is as follows :—

RHYL, February 9th, 1885.

DEAR SIR,—A meeting of the creditors of Messrs. *Ainsworth & Co.*, auctioneers and valuers, &c., Rhyl, will be held at the Crewe Arms Hotel, near to the Railway Station, Crewe, on Wednesday next the 11th instant, at 11 o'clock in the forenoon, when a full statement of the affairs of the firm and its members will be laid before the meeting, and a proposal made to try and save proceedings in bankruptcy being resorted to, which is very evident must now be the case unless the creditors will agree to accept a composition. The more the accounts are investigated, the more the liabilities appear. It now appears that when the concern stopped, the liabilities amounted to about £1,600. The assets will not amount to more than £550, from which it will be seen that the deficiency will amount to about £1000. This is independent of what our client (Mr. *Wolstenholme*) advanced into the concern during the time he was a partner (less than two years). We are sorry to give so short a notice, but some of the creditors have already taken proceedings and others are threatening therefore something must be done at once. Yours truly,

DANES & ROBERTS.

The other circular was as follows :—

RHYL, February 16th, 1885.

SIR,—A meeting of the creditors of Messrs. *Ainsworth & Co.* was held at Crewe on Wednesday last, but in consequence of the smallness of the attendance of the creditors, no proposal was made. A full statement of the accounts, as far as our client, Mr. *Wolstenholme*, could give, was laid before those present. In December last, when our client took the affairs into his own hands to try and wind up the concern, and intending to pay the creditors 20s. in the pound, he was informed the total liabilities did not amount to more than about £800. Upon the faith of that statement, our client realised the estate which did not produce more than £500. He went on to pay the creditors as fast as he possibly could, but the more he paid the more the claims came in. After paying about £721, and about £221 more than the assets realised, he placed the books in the hands of an accountant, and upon further investigation, it now turns out that the present claims amount to about £1179. Our client had, during the twelve months he was in partnership, put into the concern out of his private means £436. No account of this is taken. He had also advanced to the old firm "Ainsworth and Jones" on a note of hand £300. This also is not taken into account, so that our client is completely ruined by the affair. Through the

kindness of friends, and by raising some money upon his furniture, we think he may manage to pay 10s. in the pound, provided all the creditors will accept it to save bankruptcy proceedings. If all the creditors will not agree, there is no alternative but to seek the protection of the Court. Please let us have your answer. Yours truly,

DANES & ROBERTS.

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IN RE
WOLSTEN-
HOLME,
EX PARTE
WOLSTEN-
HOLME.

I submit that in neither of the circulars is there a definite notice of suspension, and that they do not constitute an act of bankruptcy. The notice must be a definite notice that a debtor intends to stop. In the case of *In re Friedlander, Ex parte Oastler & Co.* (see *ante*, Volume I., page 207), the Court of Appeal held: "(1) That where a verbal statement was made by a debtor to one of his creditors that he was unable to pay his debts in full, such statement did not amount to a notice by the debtor 'that he has suspended, or that he is about to suspend payment of his debts,' so as to constitute an act of bankruptcy. (2) That although such notice need not in order to constitute an act of bankruptcy be necessarily given in writing, still, if it is given verbally, it must be a formal notice, and given with the intention of giving such notice." And Lord Justice LINDLEY said then in his judgment, "First, as to the words 'gives notice.' That does not mean mere casual talk; it must be something formal and given with the intention of giving notice." Also in the more recent case of *In re Walsh, Ex parte the Trustee* (see *ante*, page 112), the Divisional Court held, "That the fact that a debtor called a meeting of his creditors at which he laid before them his position and made an offer of 6s. 8d. in the pound, did not amount to a notice by such debtor 'that he has suspended, or that he is about to suspend payment of his debts,' so as to constitute an act of bankruptcy." (*Counsel also referred to the facts and judgments of that case, see ante, pages 112—116.*) In the present case the word "stopped" when it is used in the circular is merely an inaccurate expression of the solicitor. It means the transition of the business of the firm. The object of the circulars was not to suspend payment, but to get the best terms possible from the creditors.

Yate Lee for the petitioning creditor:

What was the object with which this sub-section 1 (h) of sec-

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tion 4 was inserted in the new Act? Before the year 1883 it was common practice for a trader to send out notices saying he was about to suspend payment. Afterwards, however, dealings often took place between the debtor and his creditors. That was felt to be unfair, and the object of the new Act was to meet the evil, by making the notice of suspension a new act of bankruptcy in order to prevent these unfair dealings. The section says that an act of bankruptcy shall be committed if a debtor gives notice (1) that he has suspended; or (2) that he is about to suspend payment of his debts. In this case both these things were done. The debtor plainly informed his creditors that the liabilities cannot be met, he asks the creditors to come together, and says that the firm has stopped. (*Counsel here criticised the first circular.*) It is evident that there must be a bankruptcy unless the creditors accepted a composition. The words "when the concern stopped" must mean that the firm had actually stopped. The requisite notice need not be in so many words: "I have suspended payment;" but words from which an irresistible conclusion must be drawn that payment is stopped is quite sufficient. Then as to the second circular. (*Counsel here criticised the second circular.*) Not only does the debtor say that he has stopped, but now, that his books are in the hands of an accountant, and further, that if the creditors will not agree to the composition offered, he must seek the protection of the Court. There is ample notice of past suspension, or at any rate of an intention under the circumstances to suspend either by a composition or by bankruptcy.

CAVE, J.:

Judgment.

This is a case of some little nicety owing to the decisions which have been given in somewhat similar cases. The first thing to be done is to look at the words of the statute, and those words are that a debtor commits an act of bankruptcy if he "gives notice to any of his creditors that he has suspended, or that he is about to suspend payment of his debts." It is not requisite to give notice to all the creditors, but he must intend to give notice to that creditor to whom the notice is given. The notice must not be given in loose language, but if that is the real meaning of what he does, and the debtor does mean the creditor to infer and to act

on the belief that he is about to suspend payment, it cannot be material in what form of language he puts the notice if he makes his meaning clear. It cannot be said that the debtor must use the word "suspend." If the clear meaning is that the debtor is about to suspend payment and the creditor acts upon it, that is sufficient. Now as to the decision in the case of *In re Friedlander*. That was a peculiar case. (*The learned Judge referred to the facts of it, see ante, Volume I., page 207.*) The Court of Appeal held there that the notice was not sufficient, and that it was not a formal notice. Then we come to the case of *In re Walsh*, in which matters went a little further. There the notice was given to all the creditors. (*The learned Judge referred to the facts of that case, see ante, page 112.*) The case went a little further than that of *In re Friedlander*, because there was a general notice to all the creditors. The decision of the County Court Judge that such notice did not constitute an act of bankruptcy was affirmed on appeal. I was myself a member of the Divisional Court on that appeal, and we did not feel justified in putting a different construction on what took place at the meeting to that put by the learned County Court Judge. Now we come to the present case. The facts are different. *Ainsworth & Co.* had carried on business at Rhyl and had got into difficulties. In the first circular which was sent out Mr. Wolstenholme is undoubtedly spoken of as a partner, and so far as *Ainsworth & Co.* are concerned I confess that, to my mind, what is said in the first circular looks very like a notice of suspension of payment. It says, "when the concern stopped, the liabilities amounted to 1600*l.*; the assets will not amount to more than 550*l.*, from which it will be seen that the deficiency will amount to about 1000*l.*" But the present case does not stop there. There is the second circular. In that we find, "Through the kindness of friends, and by raising some money upon his furniture we think he may manage to pay 10*s.* in the pound, provided all the creditors will accept it to save bankruptcy proceedings. If all the creditors will not agree there is no alternative but to seek the protection of the Court." Now that, to my mind, is most important. I cannot understand it in any other way than this: "If you do not accept 10*s.* in the pound, which the debtor will pay, not out of his own assets, but through the kindness of his

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friends, he will seek the protection of the Court." It does not say, "If you do not take it, I will go on." It says distinctly, "If you do not take it, I will become bankrupt." I am clearly of opinion, that where a man says to his creditors, as the debtor did in this case, "I can only pay 10s. in the pound, and I cannot pay that except through my friends, and if you do not take it I must be bankrupt," the notice is sufficient. I entirely agree with the decision of the County Court Judge, and I am persuaded that it would be frittering away the language of the section if it was not held that this was an absolute notice within the section.

A. L. SMITH, J.:

I am of the same opinion, and I must confess that, if it were not for the cases of *In re Friedlander* and *In re Walsh*, I should have thought the point unarguable. The section says that a debtor commits an act of bankruptcy if he "gives notice to any of his creditors that he has suspended, or that he is about to suspend payment of his debts." Here we have a debtor who, in the most formal manner, calls a meeting of his creditors, and in effect says : "The most I can pay is 10s.; I shall get that from my friends; and if you do not take it, I shall go to the Court of Bankruptcy." If that is not a notice, what in the world is? What has he got his creditors together for? Now, are we precluded from taking this common-sense view by the cases which have been decided? The case of *In re Friedlander* was a bad case for the section—that is, bad for the Court to put a broad construction on the section. Then, in the case of *In re Walsh*, it was a mere notice of insolvency. Nobody has yet said that a notice of insolvency coupled with something else is not a notice of suspension. Where a man says "I am insolvent, and I shall seek the protection of the Court," surely the notice is sufficiently absolute. I am clearly of opinion that the decision of the County Court Judge must be upheld.

Appeal dismissed with costs.

CASES relied upon and referred to :—

In re Friedlander, Ex parte Oastler & Co. See ante, Volume I., page 207, L. R. 13 Ch. Div. 474.

In re Walsh, Ex parte The Trustee. See ante, page 112.

IN RE CLARKSON, EX PARTE ALLESTREE.

DIVISIONAL
COURT.

IN RE CLARKSON, EX PARTE CLARKSON.

BEFORE
CAVE, J.,
and
A. L. SMITH, J.
1885.

Bankruptcy Act, 1883, section 28.

Discharge of bankrupt—Conditions of discharge—Judgment entered under section 28, subsection (6). June 24th.

A debtor at the time when the action was commenced in which final judgment was obtained against him, upon which the receiving order was subsequently made, carried on business in partnership with his father, and had a considerable income. During the pendency of the proceedings in the action, the debtor paid away the money belonging to him in the business, and also received notice from his father to quit the partnership.

The County Court judge granted the bankrupt his discharge on the terms that he should pay to the trustee in the bankruptcy the sum of £700 out of his earnings or income or any after acquired property.

Held (on appeal) : That the order of the County Court judge must be modified, and that there would be an order granting to the bankrupt his discharge on consenting to judgment being entered against him in the terms of section 28, subsection (6), of the Bankruptcy Act, 1883.

THESE cases were taken together, and were appeals against an order of the learned judge of the Burton County Court, made on May 11th, 1885, and granting to the bankrupt, *G. R. Clarkson*, his discharge upon the terms that he should pay to the trustee in the bankruptcy the sum of 700*l.* out of his earnings or income, or out of any after-acquired property.

In the first appeal, the appellant, Miss *Allestree*, the principal creditor, appealed from the above order on the ground that the terms imposed were too lenient.

In the second appeal, the bankrupt *Clarkson* himself appealed on the ground that the terms were much too hard.

On February 20th, 1884, an action for breach of promise of marriage was commenced by Miss *Allestree* against the debtor *Clarkson*, and on May 2nd, 1884, the statement of claim was delivered.

On June 3rd, 1884, the defendant in the action delivered his defence, in which, among other pleas, he alleged unchastity on the

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part of the plaintiff, and that he first discovered the fact after the promise had been made.

On June 26th, 1884, however, the defendant obtained leave to amend by striking out the plea of unchastity, and on July 15th, 1884, he withdrew his defence altogether.

Owing to the long vacation intervening judgment was not signed until October 30th, 1884, but an enquiry took place before the sheriff on November 18th, which resulted in a verdict for the plaintiff for 1,500*l.*, with costs taxed at 115*l.*

It appeared that at the time when the promise was made, and the action commenced, the debtor was in partnership with his father as a brewer, and had a considerable amount of money in the business, his income being 700*l.* a year. During the pendency of the proceedings, however, the whole of this money was drawn out and paid away, and notice to leave the business was also given to the debtor by his father, in accordance with certain articles of the partnership.

On November 24th, 1884, after the verdict had been given, an offer of 500*l.* was made by the defendant's solicitor to the plaintiff, but this was not accepted, and on December 28th a bankruptcy notice was served by the plaintiff, claiming 1,600*l.*, upon which a receiving order was made on December 31st.

The statement of affairs filed by the debtor showed assets amounting to only 30*s.*, and debts 1,615*l.* due to Miss Allestree, together with 180*l.* to other creditors.

The discharge of the bankrupt was subsequently granted by the learned County Court Judge upon the terms above set out, against which the present appeals were lodged.

E. Cooper Willis, Q.C. (F. C. Willis with him) for Miss Allestree.

I most strongly object to the plea put forward by the defendant in his defence. No one ought to put such a plea on record unless he is prepared to substantiate it. Moreover, it is a very strange coincidence that the notice to leave the business was given by the father at the time when it was. When the Court has to consider the case of a discharge, the Court looks at the whole of a debtor's conduct. Here the debtor said, in his examination by the official

receiver, that he had spent the money, and that his insolvency was due to the amount he had spent on Miss *Allestree*, and that the action was brought out of revenge and spite. Section 28 of the Bankruptcy Act, 1883, provides for the discharge of a bankrupt, and enacts that such discharge shall be refused in all cases where the bankrupt has committed any misdemeanour under that Act or the Debtors Act, 1869; and further, that the Court shall on proof of certain facts, "either refuse the order, or suspend the operation of the order for a specified time, or grant an order of discharge subject to such conditions as aforesaid." Those facts are enumerated in sub-section (3) of section 28, and include (e) "That the bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him." That is this case. What I submit is, that, having regard to all the circumstances of the case, the proper order would be, not that the bankrupt should pay a part of his debt, but that if hereafter he could be made to pay the whole he should do so, and that judgment should be entered against him, not to be put in force without leave of the Court. That could be done under section 28, sub-section (6), which provides that:— "The Court may, as one of the conditions referred to in this section, require the bankrupt to consent to judgment being entered against him by the official receiver or trustee for any balance of the debts provable under the bankruptcy which is not satisfied at the date of his discharge; but in such case execution shall not be issued on the judgment without leave of the Court, which leave may be given on proof that the bankrupt has, since his discharge, acquired property or income available for payment of his debts." Consider for one moment the conduct of the debtor in this case. Between February 20th and October 30th he got rid of all the money standing in his name—all his income—and went out of the business. That was all after action brought. If ever there was a case in which the Court ought to impose serious conditions of discharge this is one.

Bigham Q.C. (Hextall with him) for the bankrupt Clarkson.

I submit that the order made is much too severe. The Court in considering a discharge looks at and acts on the report of the

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official receiver. The Court does not go behind that report. It is the only material on which the judge ought to proceed. This is not the ordinary case of a man going to the Bankruptcy Court on his own petition. The debtor was taken to the Court. He had made a reasonable offer to Miss Allestree, which was refused. It is quite impossible that the debtor will, at any rate for many years, be able to carry out the order as it stands, for he is now simply employed as a brewer's traveller, and his salary, which constitutes all his income, amounts to only 3*l.* a week. The payments alleged to have been made were made *bona fide*; and the father had a perfect right to give the debtor notice to leave the business in the way he did.

CAVE, J.:

Judgment.

I am of opinion that the order of the County Court Judge in this case must be modified. As it stands it does not meet the position of the case. The Court has power to grant a discharge subject to conditions, and the County Court Judge has granted a discharge subject to conditions, which I think cannot be fulfilled by the debtor if this is a genuine case. The debtor is to be discharged upon the terms that he shall pay to the trustee in the bankruptcy, the sum of £700 out of his earnings or income, or any after-acquired property. If the case is *bona fide* he is now a clerk at 150*l.* a year. He could not possibly put by more than 50*l.* a year out of that. It would take him fourteen years to pay the £700, and if those facts are true, the conditions are too hard. But it may be that those facts are not true. The debtor is the son of a wealthy brewer. Up to and after it was known the action was brought he had an income of 700*l.* a year, dependent, it is true, on his father's favour, and he went on enjoying it until the very ill-advised plea he set up was withdrawn. I must doubt whether the notice to dissolve the partnership—which was given, it seems, on the very day when the plea was withdrawn—was not given with the object that the debtor should be able to represent himself without income. If that is so, it might be that the father would pay the 700*l.* to-morrow and take his son back. That would be a most unfair use of the bankruptcy law. I think, therefore, that the discharge should be granted on the condition that the bank-

rupt consent to judgment being entered against him. No execution can issue without leave of the Court, and this course will have the advantage of keeping the matter within the hands of the Court. It will prevent undue harshness to the debtor, and will also prevent his doing anything unfair. The order of the Court below will be discharged, and there will be an order that the debtor shall have his discharge on consenting to judgment being entered against him in the terms of Section 28, sub-section (6), of the Bankruptcy Act, 1883.

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A. L. SMITH, J.:

I entirely agree.

Order accordingly.

Solicitors : *Jennings, Son, & Burton*, for Miss Allestree.
Brook, Chapman, & Co., for the bankrupt.

IN RE KNIGHT, EX PARTE COOPER.

Bankruptcy Act, 1883, section 47, subsection (2).

Marriage settlement—Future settlement of money.

Where by a marriage settlement the settlor covenanted that he, during his life, or his representatives within twelve months after his death, would pay the sum of £5000 to the trustees to be held by them on the trusts of the settlement, and the settlor subsequently became bankrupt.

Held, following the decision of the Court of Appeal in the case of *Ex parte Bishop, In re Tonnes* (L. R. 8 Ch. App. 718) : That a covenant for payment of a sum of money not specifically earmarked, was not within section 47, subsection (2), of the Bankruptcy Act, 1883, as a covenant for the future settlement of money or property in which the settlor had no interest at the date of his marriage, and that the trustees were entitled to prove against the estate.

DIVISIONAL
COURT.
BEFORE
CAVE, J.,
AND
A. L. SMITH, J.
1885.

June 24th.

THIS was an appeal against an order of the learned judge of the Leeds County Court allowing a proof.

In the year 1878 the bankrupt, *Arthur Knight*, who was then

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assisting his father as a stationer, married a lady having property both in possession and expectation, which property was settled on herself.

At that time *Knight* himself had no property whatever, but in view of the marriage he then executed a marriage settlement, by which he covenanted that he during his life, or his representatives within twelve months after his death, would pay the sum of 5000*l.* to the trustees of the said settlement.

Knight subsequently became bankrupt, and the question now arose whether such settlement was valid, and the debt payable by the trustees under it.

West for the appellant, the trustee in the bankruptcy.

The sole point seems to be, Does this case come within the case of *Ex parte Bishop*, *In re Tonnies* (L. R. 8 Ch. App. 718), or can it be distinguished? Section 47, sub-section (2), of the Bankruptcy Act, 1883, provides that "any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children, of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void as against the trustee in the bankruptcy." On the wording of that section this is the very case that the Act had regard to. A trader who is about to marry cannot enter into a covenant to say he will hereafter settle money which will give the trustees of the settlement the right to go against and in conflict with his trade creditors. In the case of *Ex parte Bishop*, "A trader by his marriage settlement covenanted that he would pay 6,000*l.* to the trustees on or before a given day, to be held by them on the trusts of the settlement. Before the money was payable he filed a petition for liquidation by arrangement:—And it was held (affirming the decision of BACON, C.J.), that a covenant for payment of a sum of money not specifically earmarked, was not within the 91st section of the Bankruptcy Act, 1869, as a covenant for the future settlement of money or property in which the trader had no interest at

the date of his marriage, and that the trustees were entitled to prove against his estate for the 6,000*l.*, less the value of the settlor's life interest, which they were entitled to retain." The question is, does the case of *Ex parte Bishop* go to a case where the settlor has nothing. A man who has money is entitled to settle, and he is entitled to covenant to settle. A man who has not cannot settle, and he is not entitled to covenant to settle. If this man *Knight* had nothing at the time of the settlement—had nothing but what is left to us all, "hope,"—it is a void settlement. I would refer your Lordships to the report of the case of *Ex parte Bishop* in the Court below (28 L. T. 567), which seems to show that the settlor there had money, and Chief Judge *BACON* said: "I have to consider whether this covenant to pay entered into by a man who at that time, as is admitted, was solvent, and had the apparent means of satisfying the covenant, is a covenant to settle money or property in which he had not an interest. . . . It is said that this is a covenant to settle money or property in which he had no interest. The Act of Parliament is directly opposed to such a state of circumstances, and if he had agreed to settle money or property in which he had no interest, then it would be clearly within the prohibition of the statute. But I do not read this covenant as being that. The covenant is merely a personal covenant on his part, not settling any property or money in which he had no interest. I do not say that there is not considerable difficulty in the construction of the clause, but as there is no other law upon the subject than that which is contained in these words, and applying these words to the admitted facts of the case, I cannot persuade myself that this covenant falls within the prohibition of the statute. It is a covenant to pay a sum of money on a day fixed without any reference to any property, and not out of anything which is there specified."

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Banks, for the trustees of the settlement, was not called upon.

CAVE, J.:

I am of opinion that this appeal must be dismissed. The case Judgment. of *Ex parte Bishop*, *In re Tonnies* (L. R. 8 Ch. App. 718), cannot be got over. The decision there was that such a covenant as we

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have before us was not within the corresponding section of the Bankruptcy Act, 1869, as being a covenant for the future settlement of money or property in which the settlor had no interest at the date of his marriage, and that the trustees were entitled to prove against his estate. We are bound by the Court of Appeal.

A. L. SMITH, J.:

I am entirely of the same opinion. If this case had come before us *res integra* much might have been urged on behalf of the appellant. But when we look at the judgments in the Court of Appeal, in *Ex parte Bishop*, we find Lord Justice JAMES says: "The Chief Judge has been of opinion, and I cannot entertain a doubt that he was correct in his conclusion that this covenant is not within the words of the 91st section, or the intention of the legislature in framing it. I am of opinion that if the legislature had intended that it should apply to a common covenant to pay a sum of money to trustees of a marriage settlement, they would have said so. But these words are 'a covenant or contract for the future settlement of any money or property, wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder.' The plain intention was to prevent settlements of property expected to accrue at a future time, in which the settlor had no present interest." And Lord Justice MELLISH says, "The object of the legislature was to provide that specific money or property which, but for the section, would have gone to the trustees exclusively, should be divided equally among the creditors. A covenant to settle such money or property would in equity have bound it when it came into actual possession, and the intention was that if the covenantor had no interest at the time it should go to the creditors, and not to the trustees of the settlement. If this had been a covenant that in case any property was left to the covenantor by his father or any other person, he would settle it, and the covenantor had no interest in it at the time, the covenant would be void against the trustee in bankruptcy, and any property which might be realised would be divisible among the creditors. The word 'money,' in my opinion, refers to something in the same nature as 'property,' namely something specific, and

does not apply to that which is a mere debt due from the settlor." The present appeal must therefore be dismissed.

Appeal dismissed with costs.

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Solicitors : *Middleton & Co.* for the trustee in the bankruptcy.
Nelson, Wright & Nelson for the respondents.

Case referred to and followed :—

Ex parte Bishop, In re Tonnies, L. R. 8 Ch. App. 718 ; 42 L. J. Bank. 107 ; 28 L. T. 567 and 862.

PRACTICE.

IN RE MUNDY, EX PARTE STEAD.

Bankruptcy Rules, 1883, *Rules 112 and 116.*

Preliminary objection—Appeal out of time—Notice—Costs—Rules of the Supreme Court, Order LVIII., Rules 9 and 15.

Held: That as a matter of courtesy, the solicitor of a respondent, if he is aware of a preliminary objection to an appeal, ought as early as possible to give notice to his opponent of such preliminary objection.

If, however, the notice is not given, and the appeal is dismissed on the preliminary objection, such omission to give notice is no reason for depriving the respondent of the costs of the appeal.

Compare and quere *In re Speight, Ex parte Brooke* (L. R. 13 Q. B. D. 42), and *In re Blenkhorn, Ex parte Bleasdale and Bleasdale* (see *ante*, Volume I., Page 280).

COURT OF
APPEAL
BEFORE THE
MASTER OF
THE ROLLS,
BAGGALLAY,
L.J.,
FEB. 1885.
July 17th

This was an appeal from an order of Mr. Justice CAVE.

*E. Cooper Willis, Q.C. (Nicoll with him), for the appellant.
Wace for the respondent.*

Wace :

I have a preliminary objection. The notice of appeal was given too late. The judgment was on May 22, 1885. The notice of appeal was not served until June 13th. The appeal is out of time.

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(See R. S. C. Order LVIII. Rules 9, 15. Bankruptcy Rules, 1883, Rules 112 and 116.)

E. Cooper Willis, Q.C.:

I must admit that I am a day or so out of time. The fact is that the appellant wrote to the respondent saying he intended to appeal, and seems to have thought that that would be taken as notice of appeal. If the respondent now stands upon his strict rights I cannot combat them. But if the objection is held fatal, I ask that the appeal may at any rate be dismissed without costs. The respondent did not give us previous notice of his intention to rely on this preliminary objection. There was at any rate no notice until after counsel's briefs on the appeal had been delivered. In the case of *In re Speight, Ex parte Brooke* (I. R. 18 Q. B. D. 42), it was held, that "when the respondent to an appeal intended to take a preliminary objection, he should give notice to the appellant at the earliest possible moment of his intention so to do, and of the nature of the objection, in order that the appellant might know that if he went on with his appeal, he did so at the peril of costs." Also in the more recent case of *In re Blenkhorn, Ex parte Blease & Blease* (see *ante*, Volume I., page 280), the Divisional Court in Bankruptcy upheld that practice and dismissed an appeal which was out of time, without costs.

THE MASTER OF THE ROLLS (BRETT, LORD ESHER) :

Judgment.

I agree with the cases which have been quoted to this extent, that, as a matter of professional courtesy, a solicitor ought to inform his opponent of his intention to rely on an objection of this nature. In good offices this would doubtless be done. But it is not a matter of law, and the omission to give the notice makes no difference as to costs, and is no reason for depriving the respondent of them. The appeal must, therefore, be dismissed with costs.

BAGGALLAY, L.J., and FRY, L.J., concurred.

Appeal dismissed with costs.

Solicitors : *Deacon, Son, & Gibson*, for the appellant.
Loxdale & Jones for the respondent.

CASES relied upon :—

- In re Speight, Ex parte Brooke*, L. R. 13 Q. B. D. 42.
In re Blenkhorn, Ex parte Bleasce & Bleasce. See ante, Volume I.,
page 280 : L. R. 14 Q. B. D. 128.

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IN RE TIPPETT, EX PARTE TIPPETT.

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APPEAL.
BEFORE THE
MASTER OF
THE ROLLS,
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Preliminary objection—Appeal out of time—Rules of the Supreme Court, Order LVIII., Rules 9 and 15—Order appealed from in the nature of an interlocutory order.

On an appeal from the refusal by the registrar of an application of the debtor for leave to summon a fresh first meeting of his creditors, the objection was taken that the appeal was out of time.

The appellant's solicitor deposed that he had mistaken the effect of the rules, and was of opinion that the time for appealing ran from the date of the perfecting of the order, instead of the date when it was pronounced.

Held: That the order appealed from was in the nature of an interlocutory order, and as no harm could be done to any one, the time would now be extended.

THIS was an appeal from a decision of Mr. Registrar Pepys refusing an application made by the debtor *Tippett* for leave to summon a fresh first meeting of his creditors.

Hansell for the appellant.

J. Linklater for the respondent.

A. White for the official receiver.

Linklater:

The appeal is out of time. The order appealed from was made on June 4th last. Notice of appeal was not given until June 30th.

Hansell:

I have an affidavit answering that objection. The delay was

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TIPPETT.

caused by mistake. The mistake arose in this way. The order, although made on June 4th, was not drawn up until June 15th. The appellant's solicitor thought that the time ran from the date of the drawing up or perfecting of the order instead of from the date when it was pronounced. Rule 112 of the Bankruptcy Rules, 1883, runs thus:—"Subject to the powers of the Court of Appeal to extend the time, under special circumstances, no appeal to the Court of Appeal from any order of the Court shall be brought after the expiration of twenty-one days. The said period shall be calculated from the time at which the order is signed, entered, or otherwise perfected; or, in the case of the refusal of an application, from the date of such refusal." Of course the solicitor was wrong, but it is hard that the appellant should lose his right, and I ask the Court under the circumstances now to extend the time.

A. White for the official receiver:

On June 30th the official receiver gave notice to the appellant that he was out of time. The affidavit of the solicitor explaining this mistake was not filed until this morning, July 17th.

THE MASTER OF THE ROLLS (LORD ESHER):

Judgment. It seems to me that the order appealed from was in the nature of an interlocutory order. No harm has been done to any one, and if we allow the appeal to be heard now without delay, no harm can be done to any one. We will, therefore, hear the appeal, but if any harm has been caused I do not say that we should do so.

BAGGALLAY, L. J.:

I hold the same view. I adhere still to what I said in the case of *Collins v. The Vestry of Paddington* (L. R. 5 Q. B. D. 368). There a distinction was drawn between granting an extension of time after final judgment and in interlocutory proceedings. I then expressed the opinion that although before judgment applications for extension of time should be freely granted, yet after judgment applications of the kind ought to be allowed only with very great caution. I do not express now any decided opinion, but it seems to me that the present appeal is in the nature of an interlocutory

proceeding. It does seem one of a class of cases in which, if a proper reason is assigned for an extension of time, such extension may be granted. I do not go so far as to say that as a general rule the fact that a solicitor says he has read the rule wrongly affords a good reason. If that were so it would open a door to much that is harmful. But here I do not think any harm can be done by allowing the appeal to be heard, and we will, therefore, extend the time for that purpose.

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FRY, L. J.:

I will not disagree, but I must say that if I had been sitting alone I fear I should have felt constrained to take a different view. To me the affidavit put in in explanation of the delay is highly unsatisfactory. The rule is quite plain, and it is difficult to understand how its meaning could be mistaken.

Objection allowed, but time extended.

The appeal was then heard on the merits and dismissed with costs.

Solicitors : *J. Pettengill* for the appellant.

Robbins, Cameron & Kenn for the respondent.

W. W. Aldridge for the official receiver.

Case referred to :—

Collins v. The Vestry of Paddington, L. R. 5 Q. B. D. 368.

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APPEAL.

BEFORE THE
MASTER OF
THE ROLLS,
BAGGALLAY,
L.J.,
FRY, L.J.
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IN RE MARSH, EX PARTE MARSH.

Taxation of costs of solicitor to trustee in bankruptcy—Costs of taxation—6 & 7 Vict. c. 73.

Held: (1) That where in an ordinary taxation of the costs of the solicitor to the trustee in the bankruptcy, the amount of the solicitor's bill is reduced by more than one-sixth, there is no rule in the Court of Bankruptcy that such solicitor shall pay the costs of the taxation.

(2) That the provisions of the Attorneys and Solicitors Act (6 & 7 Vict. c. 73), do not apply in an ordinary reference to tax such costs, but the taxation is regulated by the practice of the Court of Bankruptcy.

THIS was an appeal from a decision of Mr. Registrar Murray dismissing an application made by Mrs. Marsh, the wife of the bankrupt, that Mr. A. E. Rosenthal, the solicitor to the trustee in the bankruptcy, and Messrs. Radcliffes, Cator & Martineau, who had been employed by the trustee in certain special business connected with the bankruptcy, might be ordered to pay the costs of the taxation of their respective bills of costs, on the ground that in each case more than one-sixth of the amount had been taxed off.

Orders were made for the taxation of the above-mentioned bills in ordinary course, and Mrs. Marsh, who had been admitted as a creditor upon the estate of the bankrupt, obtained an order giving her leave to attend such taxation, which she attended by her solicitor.

The bill of Mr. Rosenthal as carried in for taxation amounted to 257*l.* 17*s.* 9*d.*, and that of Messrs. Radcliffes, Cator & Martineau to 188*l.* 14*s.* 6*d.* In the former case 91*l.* 14*s.* 11*d.*, and in the latter 25*l.* 4*s.* 8*d.* was taxed off. In each case the bill was reduced by more than one-sixth.

Mrs. Marsh thereupon applied to the court under the provisions of the Attorneys and Solicitors Act, 1843 (6 & 7 Vict. c. 73, sections 37, 38, and 39), for an order that the solicitors named might be ordered to pay the costs of the taxation.

The learned Registrar, in refusing the application, said, "The application is novel and unprecedented, unknown in the taxing

master's office, so far as regards the taxation of trustee's solicitors bills, and none the less novel and unprecedented because the application happens to be made not by the trustee himself, but by a creditor. The application is one which is altogether outside the provisions of the 6 & 7 Vict. c. 73, commonly known as the Attorneys and Solicitors Act, and must be governed by the practice obtaining in this, the Bankruptcy Court. The cases cited in support of the application, the most recent of which is over fifty years old, were all cases in which orders of reference were made at the instance of the assignees of the parties chargeable, and no doubt show that in those days there was a practice under which by analogy to the practice in the Courts at Westminster Hall, the costs of the taxation were ordered to be paid according to the result. But in those days there were no rules of Court as regards such taxation, nor in fact any Taxing Master's Department in Bankruptcy at all, and it is curious to trace back the position of things in regard to these taxations, which I have done shortly with the very able assistance of Mr. Duncan Stewart, one of the taxing masters of this court.

"The application is, in my opinion, misconceived and untenable, and must be dismissed with costs."

From this decision Mrs. Marsh now appealed.

Woodfall (Atherley Jones with him) for the appellant.

The application falls under sections 37, 38, and 39 of the Attorney and Solicitors Act, 1843. The trustee is chargeable with the bill, but the creditors are liable to pay it. In the case of *Ex parte Fosbrooke* (5 Jur. 370), one of three co-assignees, in opposition to the wish of his co-assignees, proceeded to tax the solicitors bill, and succeeded in taxing off one-sixth of the amount, and it was held that he was entitled to his extra costs incurred in so doing, by being obliged to employ a solicitor for himself; and that the bankrupt's estate was liable to the difference between the costs incurred in taxation as between party and party, and as between solicitor and client.

Rosenthal for Mr. A. E. Rosenthal; and

F. C. Willis for Messrs. Radcliffes, Cator & Martineau were not called upon.

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MARSH,
EX PARTE
MARSH.

BANKRUPTCY REPORTS.

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MARSH,
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MARSH.

Judgment.

THE MASTER OF THE ROLLS (LORD ESHER):

I am of opinion that the decision of the Registrar was quite right. The application was contrary to the settled practice of the Court of Bankruptcy, and the appellant is not a party named in any of the sections of the Attorney and Solicitors Act for the purposes of an application of this kind. That Act did not apply. The appeal must, therefore, be dismissed with costs.

BAGGALLAY, L. J. :

I entirely agree.

FRY, L. J. :

And I also. The Registrar says that at any rate for the last fifty years no such practice has been known in the Bankruptcy Court.

Solicitors : *E. Kimber* for the appellant.

A. E. Rosenthal.

Radcliffes, Cator, & Martineau.

Case referred to.

Ex parte Fosbrooke, 5 Jur. 370.

COURT OF
APPEAL.

BEFORE
COTTON, L.J.,
LINDLEY, L.J.,
FRY, L.J.
1885.

June 22 and
July 22.

COLONIAL BANK v. WHINNEY.

Bankruptcy Act, 1883, Section 44, sub-section (iii.).

*Order or disposition—“Trade or business”—Reputed ownership—Railway shares
in name of a partner—Chose in action.*

Where a partner in a stockbroking firm purchased shares in a railway company with money of the firm, and subsequently deposited the share certificates with the firm's bankers as security or cover for advances made by them to the firm, and before notice of the deposit had been given to the railway company, the firm, and also the members of it were adjudicated bankrupts.

Held : (1) That the trustee in the bankruptcy was entitled to such shares

as goods in "the possession, order, or disposition of the bankrupt in his trade or business," within section 44, sub-section (iii.), of the Bankruptcy Act, 1883.

(2) That the words "in his trade or business" in the said section, mean "for the purposes of and as connected with his trade or business."

(3) (Fry, L. J., dissentient.) That such shares were not choses in action within the meaning of the Act, so as to be excepted from the doctrine of reputed ownership.

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THIS was an appeal from a decision of Vice-Chancellor BACON, and raised an important question between the holders of railway share certificates deposited with them as security for a debt, and the trustee in the bankruptcy of the depositor, by whom they were claimed under the reputed ownership clause, section 44, sub-section (iii.), of the Bankruptcy Act, 1883.

The case arose out of the failure of the firm of *P. W. Thomas & Co.*, consisting of *W. E. Blakeway* and *P. W. Thomas*, who carried on business as stock and share brokers.

Previous to the year 1880 certain shares in the Forth Bridge Railway Company were purchased by *W. E. Blakeway* with monies of the firm, such shares being registered in his sole name. Calls on the shares were made on *W. E. Blakeway* alone as such registered owner, but were paid with monies of the firm, and the dividends on the shares were from time to time paid into the bank to the account of the firm.

On April 1st, 1880, the firm owing the sum of 180,000*l.* to the Colonial Bank, *W. E. Blakeway* deposited with the bank as security or cover for advances made these certificates of the Forth Bridge shares.

On January 29th, 1884, *W. E. Blakeway* absconded, and on January 30th, *P. W. Thomas* presented a bankruptcy petition, upon which, on the 31st, a receiving order was made.

On February 1st, 1884, a petition was presented against the firm, and on February 5th the members of it were adjudicated bankrupts.

No notice to the Forth Bridge Company of the deposit of the share certificates was given by the Colonial Bank until January 31st, 1884.

The shares were claimed by the trustee in the bankruptcy on the ground that they belonged to the firm, and it was held by

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Vice-Chancellor BACON that such shares were "goods in the possession, order, or disposition" of the firm "in their trade or business" at the date of their bankruptcy, within section 44, subsection (iii.), and section 168 of the Bankruptcy Act, 1883, and therefore belonged to the firm's trustee in the bankruptcy.

From this decision the Colonial Bank now appealed.

Rigby, Q. C. (Northmore Lawrence with him) for the Colonial Bank.

Assuming that Blakeway was the reputed owner, the shares were not used in the business of the firm. They were the separate property of Blakeway. In no way could they appear to be firm assets. Again, the doctrine of reputed ownership applies only when reputation is acquired by means of the goods, so that the reputed owner can get credit. In the case of *Ex parte Wingfield, In re Florence* (L. R. 10 Ch. Div. 591), JESSEL, M.R., said, at page 593, "This is an attempt in the year 1879 to alter the universal opinion as to the meaning of this section. It has always been called the 'reputed ownership' clause. Since the passing of the Act, 6 Geo. 4, c. 16, there has been no substantial difference in the words. They were intended to meet the case of a man obtaining credit from being seen in possession of another person's property as his own, and the true owner is to lose his property by reason of his having allowed this credit to be given. That is the real meaning of the section, and the words have always been so understood." It is only in the case of visible goods that the section applies. Under the new Act the words "goods in the trade or business of the bankrupt" restrict the goods to such as are actually used and employed in the trade or business. Formerly goods belonging to a trader were liable to seizure, which by no stretch of imagination could be said to be used in his trade or business. That is to be so no longer. Further, these shares being in the name of Blakeway, as trustee for the firm, were choses in action within the meaning of the Act. In the case of *Ex parte Agra Bank, In re Worcester* (L. R. 8 Ch. App. 555), such shares were referred to by Sir W. PAGE WOOD as choses in action. (Counsel referred to the cases of *Ex parte Hayman, In re Pulsford*, L. R. 8 Ch. Div. 11; 47 L. J. Bank. 54; 38 L. T. 288; *Ex parte*

Fletcher, In re Bainbridge, L. R. 8 Ch. Div. 218; 47 L. J. Bank. 70; 38 L. T. 229; and others.)

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Sir F. Herschell Q. C. (Marten, Q. C., and Buckley with him) for the trustee in the bankruptcy.

The bank were the true owners, and these shares were in the possession, order, or disposition of Blakeway, or of the firm with their consent, and pass to the trustee. The shares were distinctly used in the trade or business of the firm. The phrase "in his trade or business" means simply, in his control for the purpose of his business. The shares are not choses in action, and do not come within the proviso at the end of the sub-section. In the case of *Ex parte the Union Bank of Manchester, In re Jackson* (L. R. 12 Eq. 854), it was held by Chief Judge BACON that shares of this description were not choses in action. And in the case of *Société Générale de Paris v. Tramways Union Company* (L. R. 14 Q. B. D. 424), Lord Justice LINDLEY expressed the same opinion. (Counsel also referred to the cases—*Ex parte Huggins, In re Huggins*, L. R. 21 Ch. Div. 85; *Greening v. Clark*, 4 B. & C. 316; *Shaw v. Rowley*, 16 M. & W. 810.)

July 22nd.

COTTON, L. J.:

In this case an action was brought by the Colonial Bank, who Judgment. were the equitable mortgagees of certain shares, in order to enforce their security against the defendant, the trustee in the bankruptcy of the person in whose name the shares were standing. The question turns upon whether the trustee in the bankruptcy is entitled to these shares under the order and disposition clause—section 44, sub-section (iii.)—of the Bankruptcy Act, 1883. That section provides that the property of the bankrupt divisible amongst his creditors shall comprise "(iii.) All goods being at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the mean-

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ing of this section." The section, in fact, makes applicable for the payment of the debts of the bankrupt, property which, at the commencement of the bankruptcy, is in his order or disposition, in his trade or business, with the consent of the true owner. In the present case the Colonial Bank, having an equitable mortgage, were to the extent of that mortgage the true owners of the shares. The shares, at the time of the bankruptcy, were standing in the name of W. E. Blakeway, who was a partner with P. W. Thomas, in the firm of Thomas & Co. They had, however, been bought with the partnership money, and it appears to have been the practice of the firm to buy shares from time to time, and for the purpose of their business to obtain advances on those shares by equitable mortgage or otherwise. The first argument put forward on behalf of the appellant in this case, was that the shares in question were not affected by the sub-section, because the defendant was the trustee of the firm, and what he took would go to pay the debts of the firm. It was said that if the section applied, as this was partnership property, it would go to pay the joint debts, and not the debts of Blakeway; and that the shares could not be in his order and disposition in his trade or business. But the defendant is not a trustee in bankruptcy of the firm, he is trustee in bankruptcy of two persons who were trading together. I cannot agree that the trade or business of the firm, that is of Blakeway and Thomas, was less Blakeway's trade or business because another person was associated with him in it. The debts would be no less the debts of Blakeway because someone else would be liable with him. Neither do I think that the fact that there were calls unpaid and the directors were able to prevent the transfer until those calls were paid, is of importance. In my opinion, the mere liability of the shareholder, which the directors could enforce, and which would prevent the transfer until a certain sum of money was paid, does not prevent these shares being in the order or disposition of the bankrupt.

The first question to be considered, therefore, arises from the fact that the goods must be in the order or disposition of the bankrupt "in his trade or business." Those words are first found in the new Bankruptcy Act. Previously the clause applied where the man was a trader, and to all goods which were in his order or

disposition. There is certainly a little difficulty in the new phrase. It is in one way more extensive because it includes business as well as trade. It was intended to prevent what occurred when the private property of a man was held to be in his order or disposition because he was a trader, requiring as it does that it shall be in his order or disposition in his trade or business. Now what is the meaning of that? Where there are goods, such as stock-in-trade, of course there can be no difficulty. But I think the words go further than that. In my opinion, the true interpretation is that the goods must be in the bankrupt's order or disposition for the purpose of, and as connected with, his trade or business. Thus, when we find, as in this case, that the custom of the firm was to buy shares out of the partnership money, and to use them for the partnership business, and that these shares were so bought and so intended to be used, then, in my opinion, the shares were in this way in the order or disposition of the bankrupt in his trade or business, that is, for the purposes connected with carrying on that trade or business. In my opinion, the bank being the true owner, the shares were within the order or disposition of the bankrupt with the consent of the true owners.

But it is necessary also to consider—more especially as there appears to be some difference of opinion between us as to its true construction—the proviso of the section, which runs, “Provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section.” The question is whether, within the meaning of this section, shares in a company like this, incorporated under the Companies Clauses Act, with power of transfer so as to vest the shares at law in the person standing on the register, are choses in action. Turning from the early meaning of the term chose in action, as defined by Blackstone and other authorities (*His lordship referred to Blackstone's Commentaries, Volume II., page 397, and also to Williams' Personal Property at page 4*) there has been without doubt an extension of the original application of that term. At page 6 of Mr. Williams' book I find this paragraph. “In modern times also several species of property have sprung up which were unknown to the common law. The funds now afford an investment of which our forefathers

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were happily ignorant, whilst canal and railway shares, and other shares in joint-stock companies, and patents and copyrights are evidently modern sources of wealth ; these kinds of property are all of a personal nature, many of them having been made so by the Acts of Parliament under the authority of which they have originated. For want of a better classification, these subjects of personal property are now usually spoken of as choses in action. They are, in fact, personal property of an incorporeal nature, and a recurrence of the history of their classification amongst choses in action will, as we shall hereafter see, help to explain some of their peculiarities." It is without doubt a fact as there stated that we do find things not originally coming within the description of choses in action called by that name. In the case of *Ex parte Agra Bank, In re Worcester* (L. R. 3 Ch. 555), Lord HATHERLEY, in dealing with the question whether shares were in the order and disposition, referred to the principles applicable to dealing with choses in action. He said, "I apprehend the principle of that case to be that the first question, where there is an assignment of a chose in action, is whether the party who owes the debt or duty, as in the present case the directors of the company in which the shares were held, has had distinct and formal notice of the assignment." But he did not, it seems to me, intend to decide, nor does he decide, that such shares were choses in action. He applied the analogy of cases where there has been either an assignment of choses in action, or a question whether choses in action are within the order or disposition of the bankrupt. It does not, in my opinion, amount to a decision that shares are properly choses in action. The question really is, not whether speaking generally it may be said that shares are choses in action, but rather this—whether it is to be said that within this proviso of the Bankruptcy Act shares are intended to be referred to as choses in action. I look at other portions of the Act, and I must say that although by no means conclusive, I am in some degree influenced in my opinion that shares are not within this exception by section 50 of the Act, which provides, in sub-section (3), "Where any part of the property of the bankrupt consists of stock, shares in ships, shares, or any other property transferable in the books of any company, office, or person, the trustee may exercise the right to transfer the

property to the same extent as the bankrupt might have exercised it if he had not become bankrupt." And by sub-section (5) "Where any part of the property of the bankrupt consists of things in action, such things shall be deemed to have been duly assigned to the trustee." This does seem to show, although, as I have said, by no means conclusively, that the Legislature when passing the Act had in contemplation a distinction between choses in action and such things as shares transferable in the books of a company. But there is a further fact which, to my mind, is of the greatest weight. In the year 1871 Chief Judge BACON in the case of *Ex parte the Union Bank of Manchester, In re Jackson* (L. R. 12 Eq. 854), held under a similar exception in the Bankruptcy Act, 1869, that shares were not choses in action. The proviso in the new Act is the same as that under which that decision was given. The Legislature must have known of that decision, and if it did not intend that that construction should have been put upon the proviso it would have said so. It would not certainly have framed the exception in the same terms. I am, therefore, of opinion that these shares were not within the proviso, and that the decision of the Vice-Chancellor was right.

LINDLEY, L. J. :

I am of the same opinion. The case is of great practical importance, and it appears to be the first of its kind under the new Act, to which close attention has been given. These share certificates in a Scotch railway company, with blank transfers, were deposited with the appellants in the ordinary way of business as security for advances to the firm. The bank were not the registered owners of the shares, and they did not give notice of the deposit until too late—until after Blakeway had absconded and the bankruptcy had commenced. The question has arisen whether, under these circumstances, the bank can sustain their right to these shares, or whether they pass to the trustee of the firm. The first question to be considered in looking at section 44, sub-section (iii.), of the Bankruptcy Act, 1883, is whether these shares are goods which, at the commencement of the bankruptcy were "in the possession, order, or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner, under such circum-

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stances that he is the reputed owner thereof." These shares were standing in the name of Blakeway. He might have transferred them to any *bona fide* holder for value without notice, who, on registration, would have a perfectly good title. Now comes the question, were those shares in his trade or business? What is meant by this? It was contended on behalf of the appellants that nothing was in a man's trade or business within the meaning of the section which was not visible. The question is without doubt one of considerable difficulty, but I think that that interpretation is narrower than the section warrants. Putting aside, however, the peculiar circumstances of this case, stock, funds, or shares would not be in a man's trade or business. In the case of a grocer, for example, anything standing in his name in a railway company or in the funds could scarcely be brought within his trade or business, for it has nothing to do with it. But in the present case these shares were essentially in the bankrupt's trade or business. They were bought with partnership money, although, for convenience, they were registered in Blakeway's name, and they were acquired and used for the purposes of the business. If the words "in his trade or business" mean, as in my opinion they do, acquired for the purposes of the business, and used for those purposes, then these shares clearly were so. Nor do I think that the fact that somebody else was interested in the business rendered them less in Blakeway's business than they would have been if he had been the sole member of the firm. Then, further, we must see whether the shares were in Blakeway's order or disposition by the consent and permission of the true owner. A person who has a charge upon property of this kind is the true owner within the meaning of the section, and in this case the shares were in Blakeway's order or disposition by the consent and permission of the bank. There yet remains the question of the proviso to the section. Are shares standing in the name of the bankrupt in railway companies, such as the Forth Bridge Company, choses in action within the meaning of the section? I am of opinion that they are not. The expression *choses in action* has varied and been expanded. Originally they were used to denote a mere right to sue for debt or for damages. The idea seems to have been not that a chose in action was not a class of property, but that it was not regarded as property

at all. It was a right to sue as distinguished from property. But there is no doubt that the term has come to be applied to what we understand now as property. Stock in the public funds has been described as choses in action. Shares in companies were so called in the case of *Humble v. Mitchell* (11 A. & E. 205). The term, as Mr. Williams says, may include every kind of personal property of an incorporeal nature, for want of a better expression. It is only in this loose sense that I can understand it. There is, moreover, this most important fact to be taken into account when considering whether shares in these companies can be choses in action within the meaning of this section. Precisely the same question arose under the Bankruptcy Act, 1869. The proviso there was exactly the same as in the new Act, and Chief Judge BACON decided that in the case of a registered owner of a share in a company governed by the Companies Act, 1862, it was not a chose in action. The Legislature must have known of that decision, and yet the new Act was drawn in precisely the same language. It would be a very strong thing to say, under those circumstances, that such language ought to be construed in a different way under the new Act than under the old. I am of opinion, therefore, that the decision of the Vice-Chancellor was right, and that the appeal must be dismissed.

FRY, L.J., dissented on the ground that the shares in question were choses in action and were not within the section. His Lordship's judgment was confined to this portion of the subject, and dealt very fully with the various authorities. In conclusion he said: "For these reasons I feel constrained to conclude that the shares in question are things in action, and that consequently they are not within the present law relative to reputed ownership. I have discussed what after all is a simple point, at a length which would be needless and pedantic, were it not that I cannot differ from my brethren without hesitation and doubt, and that I wish to show that I do not differ without an attempt fully to consider the question on which I so dissent from their conclusion. My opinion is, for the reasons I have given, that the appeal should be allowed, but that opinion is, of course, under the circumstances, inoperative."

Appeal dismissed with costs.

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Solicitors : *Lawrance, Plews, & Baker*, for the Colonial Bank.
Druces, Jackson, & Attlee, for the trustee in the
 bankruptcy.

Cases relied upon or referred to :—

Ex parte Wingfield, In re Florence, L. R. 10 Ch. Div. 591 ;
 40 L. T. 15.

Ex parte Agra Bank, In re Worcester, L. R. 3 Ch. App. 555 ;
 37 L. J. Bank. 28 ; 18 L. T. 866.

Ex parte Hayman, In re Pulsford, L. R. 8 Ch. Div. 11 ; 47 L. J. Bank. 54 ; 38 L. T. 288.

Ex parte Fletcher, In re Bainbridge, L. R. 8 Ch. Div. 218 ;
 47 L. J. Bank. 70 ; 38 L. T. 229.

Ex parte the Union Bank of Manchester, In re Jackson, L. R. 12 Eq. 354 ; 40 L. J. Bank. 57 ; 24 L. T. 951.

Société Générale de Paris v. Tramways Union Company, L. R. 14 Q. B. D. 424.

Ex parte Huggins, In re Huggins, L. R. 21 Ch. Div. 85.

Greening v. Clark, 4 B. & C. 316.

Shaw v. Rowley, 16 M. & W. 810.



PRACTICE.

BEFORE
 MR. JUSTICE

CAVE.
 1885.

August 4.

IN RE ANDREWS, EX PARTE ANDREWS.

Bankruptcy Act, 1883, Section 103, sub-sections (4) and (5); Bankruptcy Rules, 1885, Rule 268 (1), (a).

Judgment summons for committal—Transfer from County Court to Bankruptcy Court—Notice to judgment debtor.

Held : (1) That where the judge of a County Court not having jurisdiction in bankruptcy, at the hearing of a judgment summons for a committal, is of opinion that a receiving order should be made in lieu of a committal, and orders the matter to be transferred to the Bankruptcy Court under Rule 268 (1) (a) of the Bankruptcy Rules, 1885, notice of the subsequent

proceedings under the order of transfer must be served on the judgment debtor.

(2) That the Court of Bankruptcy in such a case is not bound to adopt the opinion of the County Court judge, and to make a receiving order as a matter of course, but must exercise its own judicial discretion at the hearing.

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ANDREWS,
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ANDREWS.

THIS was an application on behalf of the debtor, *G. Andrews*, to rescind a receiving order which had been made against him.

The case involved an important point of practice under the Debtors Act, 1869, and the Rules made under Section (5) of that Act.

By section 103, sub-section (5), of the Bankruptcy Act, 1883, it is provided that, "Where, under section 5 of the Debtors Act, 1869, application is made by a judgment creditor to a Court, having bankruptcy jurisdiction, for the committal of a judgment debtor, the Court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor, and on payment by him of the prescribed fee, make a receiving order against the debtor. In such case the judgment debtor shall be deemed to have committed an act of bankruptcy at the time the order is made."

And by Rule 268 (1) (a), of March, 1885, "Where an application to commit is made to the judge of a Court not having bankruptcy jurisdiction, and he is of opinion that a receiving order should be made in lieu of committal, he may order the matter to be transferred to the Court to which, under the provisions of the Act and Rules, a bankruptcy petition against the debtor in relation to the amount of the judgment debt would, at the date of the transfer, be properly presented."

On May 18th last, a judgment summons was granted against the debtor *Andrews*, in the City of London Court—which is a Court not having jurisdiction in bankruptcy—on the application of Messrs. *Gosnell & Co.*

At the adjourned hearing of this summons, Mr. Commissioner *Kerr* being of opinion that a receiving order ought to be made in lieu of committal, transferred the summons and all further proceedings to the High Court sitting in bankruptcy.

On July 17th, Mr. Justice A. L. SMITH, acting as the Bank-

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ruptcy Judge, made a receiving order as a matter of course, upon the application of the plaintiff's solicitor, and without any notice having been given to the judgment debtor.

The debtor now applied to set aside the order so made.

Herbert Reed for the applicant.

The judgment debtor was entitled to notice of the application. Under section 103, sub-section (5), of the Bankruptcy Act, 1883, there was no power for any court, not having bankruptcy jurisdiction, to act. That was inconvenient, and so Rule 268 (1) (a), was passed to remedy the inconvenience. It seems to be the practice, however, if the transferring judge says a case is a fit case, for the High Court to make an order without looking into the case, and without notice to the judgment debtor. That is wrong. The question is very simple. The only Court which has power to make a receiving order is a court having bankruptcy jurisdiction. The High Court ought to look into the case to decide whether it is a proper one for a receiving order to be made, and the judgment debtor ought to have notice of the proceedings. No proceedings ought to be taken against the status of a defendant without notice. The duty of this Court is not a purely ministerial one. The effect of the transfer is to give this Court the seisin of the matter ; and proper notice ought to be given to a judgment debtor so that he may show cause. In the present case the balance of the judgment debt was only 5*l.* 15*s.*—and after leaving the City of London Court the creditor agreed to take payment of the debt by instalments of 10*s.* each.

Sidney Woolf for the judgment creditor.

I submit that the authority of the Court is purely ministerial under the section. Here the judgment debtor has had plenty of time to pay the debt had he wished to do so.

[CAVE, J.—The first point is whether you can have a receiving order without notice.]

There is the judgment and the committal summons, and no further notice can be necessary. It is a purely ministerial act on the part of the Court. There is no rule which prescribes the

necessity of any service of notice upon the debtor. In the case of *In re May, Ex parte May* (see *ante*, Volume I., page 232), it was held "That where an order has been made under sub-section (4) of section 125 of the Bankruptcy Act, 1883, transferring proceedings for the administration of a deceased debtor's estate from the Chancery Division of the High Court to the Court exercising jurisdiction in bankruptcy, the latter Court may make an administration order on an *ex parte* application by a creditor." The same principle would apply in a case like the present.

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CAVE, J.:

I am of opinion that the receiving order must be rescinded. It Judgment. seems to me clearly the proper course is, that, when a case is transferred by the judge of a Court not having bankruptcy jurisdiction, an appointment should be obtained, and the case should go into the list with the other summonses, and notice be given to the judgment debtor. This Court, after a transfer has taken place, ought to see whether a receiving order ought to be made or not. It does not act ministerially only, but it has a discretion to exercise. Sometimes it may happen that this Court will exercise its discretion at variance with the Court below, but the object of the section is, in my opinion, that the discretion shall be exercised by this Court. The case of *In re May, Ex parte May*, which has been quoted, is distinguishable. There the Court from which the transfer was made had jurisdiction to deal with the case, and had made an administration order. But in the present case the debtor's estate was not being administered under any legal process at all, and the County Court had only jurisdiction to transfer the hearing of the judgment summons to this Court, and it is for this Court to decide whether the debtor shall be adjudicated bankrupt. The receiving order must, therefore, be set aside, and the summons had better be adjourned to go into the list on Saturday.

Order accordingly.

Solicitors : *H. B. Knight* for the judgment debtor.

Benson & Benson for the judgment creditor.

Case relied upon :—

In re May, Ex parte May, see *ante*, Volume I., page 232, L. R. 13 Q. B. D. 552.

BEFORE
MR. JUSTICE
CAVE.
1885.

August 4th and 11th. **IN RE RIDGWAY, EX PARTE A. & T. A. RIDGWAY.**

Bankruptcy Act, 1883, Section 44.

Gift inter vivos—Gift of port wine to children—Immediate present gift—Intention to give in the future—Bankruptcy—Costs.

Where at the birth of his eldest son, a father laid down a pipe of port wine, and at the same time expressed an intention to give to his eldest daughter certain port wine in particular bins, such wine being thereafter known in the family as the wine of the son and daughter, but remaining in the possession and cellar of the father, who subsequently became bankrupt.

Held: (1) That under the circumstances of the case, there was no proof of any intention on the part of the father of making a present immediate gift, and that the wine belonged to the trustee in the bankruptcy.

(2) That although it is going too far to say that retention of possession by a donor is conclusive proof that there is no immediate present gift, yet unless explained, and its effect destroyed by other circumstances, it is strong evidence against the existence of such an intention; and, in order to rebut this inference, circumstances must be proved from which it can fairly be inferred that the donor intended to make an immediate gift, so that the thing given then ceased to be the donor's, and became the property of the donee. It is not enough to prove circumstances from which the proper inference is, that the donor intended to make a gift in the future, but so that until something further was done to complete the gift, he should retain the control over the thing intended to be given.

THIS was an application on behalf of *Thomas A. Ridgway* and *Miss Alice Ridgway* for an order to restrain the trustee in the bankruptcy of *Colonel Ridgway* from selling certain port wine, which the applicants claimed as belonging to them as a gift from their father the bankrupt. And for a further order that such port wine, specifically described in the notice of motion, might be delivered over to them the said applicants.

Sidney Woolf in support of the application.

The question is whether it can be established that this wine was given by *Colonel Ridgway* to these two children. It was a gift of two distinct portions of wine to the eldest daughter and the eldest son. With regard to *Tom Ridgway*, nearly twenty years ago, soon after the boy's birth, his father laid down for him the pipe of port now claimed. This fact was well known to the family and friends,

and the pipe has always been called his. Very soon afterwards, Colonel *Ridgway* gave certain other wine in particular bins in his cellar to his daughter *Alice*, and this has since been known as "Alice's wine." The gift in each case was a perfectly good one. It was not necessary that every bottle should be handed over. It is sufficient if there was an intention to give and a giving, and a consent of reception. [Counsel here read several affidavits of Colonel *Ridgway*, the applicants, the butler, nurse, and several other friends and servants of the family, in support. Colonel *Ridgway* was also called and cross-examined by Herbert Reed for the trustee. He said: "The wine is at Shepleigh Court in Devonshire, which is my country house. My failure was in February last. The whole of the pipe, that is fifty-six dozen, called Tom's, is left, except a very few bottles. In the case of Tom, it was a pipe. In the case of the girl Alice it was several dozens in particular bins. It was given to her at the time when, or immediately after, the pipe was laid down for Tom. It was then appropriated to her, and was thenceforth known in the family as her wine. It was removed from one cellar to another, but that was for convenience, and was not intended as an outward and visible sign of the gift. We have not drunk much of Alice's wine. To the best of my belief, we never took a bottle of the wine without her sanction." By the Judge. "My original intention was to give the wine to Alice and my other daughter Jane, but I only expressed the intention of giving the wine to Alice. I certainly thought that Alice had power to sell the wine and put the money in her pocket if she wished."]

Herbert Reed for the trustee in the bankruptcy.

I submit that in this case there was no such complete gift as must be shown in order to pass this wine to the applicants. At least, where constructive delivery is relied upon the property must no longer be in the dominion of the donor. In the case of *Shower v. Pilck* (4 Exch. Rep. 478), Baron ALDERSON said: "To pass the property, there must be both a gift and a delivery; here there is hardly a gift, for the words are in the future tense." And by Baron ROLFE. "There must be a delivery to make the gift valid." Also in the case of *Irons v. Smallpiece* (2 B. & Ald. 551), it was held that "a verbal gift of a chattel without actual delivery, does

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not pass the property to the donee." And ABBOTT, C.J., said : "I am of opinion, that by the law of England, in order to transfer property by gift, there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee. Here the gift is merely verbal, and differs from a donatio mortis causâ only in this respect, that the latter is subject to a condition, that if the donor live the thing shall be restored to him. Now, it is a well-established rule of law, that a donatio mortis causâ does not transfer the property without an actual delivery. The possession must be transferred, in point of fact." In Kent's Commentaries, Volume II., section 238, that learned writer says : "Gifts inter vivos have no reference to the future, and go into immediate and absolute effect. Delivery is essential, both at law and in equity, to the validity of a parol gift of a chattel or chose in action ; and it is the same, whether it be a gift inter vivos or causâ mortis. Without actual delivery the title does not pass. A mere intention, or naked promise to give, without some act to pass the property, is not a gift. There exists the locus penitentiae so long as the gift is incomplete and left imperfect in the mode of making it ; and a court of equity will not interfere and give effect to a gift left inchoate and imperfect. The necessity of delivery has been maintained in every period of the English law." There must be delivery, a mere intention to give is not sufficient ; and the donor must deprive himself of dominion. There is an American decision in the case of *Little v. Willetts* (55 Barbour, 125), which holds that "No gift inter vivos will confer title unless there be a positive change of possession, and the donor is in no position to repossess himself of the subject-matter of the gift, or to recall the same." In the present case there was no completed gift. Colonel Ridgway could at any time have taken a bottle or more of this wine.

Sidney Woolf:

The case of *Irons v. Smallpiece* has been really overruled. (Compare *Ward v. Audland*, 16 M. & W. 862). Also in the case of *Winter v. Winter* (4 L. T. 639), Mr. Justice CROMPTON said : "Actual delivery of the chattel is not necessary in a gift inter vivos. In the case of a donatio mortis causâ there is a reason for requiring some formal act. It is sufficient to complete

a gift inter vivos that the conduct of the parties should show that the ownership of the chattel has been changed. Although *Irons v. Smallpiece* and *Shower v. Pilck* have not been overruled, the subsequent cases, to speak familiarly, have hit them hard." And in the case of *In re Harcourt* (31 W. R. 578), it was held that "a clear intention on the part of the donor to give, acted upon by the donee, constitutes a valid gift inter vivos without actual delivery." In his judgment Baron Pollock said : " * * * The modern law on the subject is founded on Lord Tenterden's judgment in *Irons v. Smallpiece*. I can only say that that case has been before the Courts on the common law side of Westminster Hall for a great many years, and I cannot myself acquiesce in the view of the law there laid down. I am not bound by that decision, because Baron PARKE, afterwards Lord Wensleydale, in the case of *Ward v. Audland* (16 M. & W. 862, 871), not merely dissented from that proposition, but distinctly expressed his opinion that it was not law. That was so clearly also the opinion of so eminent a judge as Mr. Justice MAULE in another case (*Lunn v. Thornton*, 1 C. B. 379), that I think I may take it now that the true view of the law is this. The question to be determined is not whether there has been an actual handing over of property manually, but whether, looking at all the surrounding circumstances of the case, and looking particularly at the nature and character of the chattel which is proposed to be given, there has or has not been a clear intention expressed on the part of the donor to give, and a clear intention on the part of the recipient to receive and act upon such gift. Whenever such a case should arise again, I am confident that that would be the basis of the decision of a Court of common law, and, of course, the same result would follow in a Court of equity.
* * * "

1885.
 IN RE
 RIDGWAY,
 EX PARTE
 A. & T. A.
 RIDGWAY.

August 11th.

CAVE, J.:

This is a motion for an order restraining the trustee in the Judgment bankruptcy from selling certain Port alleged to belong to *Alice Ridgway* and to *Tom Ridgway*, and the wine is claimed by them as a gift from their father the bankrupt.

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RIDGWAY,
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RIDGWAY.

In order to support this claim it is necessary to show circumstances from which an intention of making an immediate present gift may reasonably be inferred. Circumstances from which an intention of making a future gift may reasonably be inferred are not sufficient.

It was contended on behalf of the trustee that change of possession from donor to donee must be shown, and that no property passes so long as the subject of gift remains in the possession of the donor. In support of that argument the cases of *Irons v. Smallpiece* (2 B. & Ald. 551) and of *Shover v. Pilck* (4 Exch. 478) were quoted.

On the other hand it was said that the principle laid down there goes too far, and has been disapproved of by Baron PARKE, in *Ward v. Audland* (16 M. & W. 862); by Mr. Justice CROMPTON, in *Winter v. Winter* (4 L. T. N. S. 689); and by Baron POLLOCK, in *In re Harcourt* (31 W. R. 578).

I am of opinion that it is going too far to say that retention of possession by the donor is conclusive proof that there is no immediate present gift, although undoubtedly, unless explained or its effect destroyed by other circumstances, it is strong evidence against the existence of such an intention. The applicants must prove circumstances from which it can fairly be inferred that the donor intended to make an immediate gift, so that the thing given then ceased to be the donor's and became the property of the donees. It is not enough to prove circumstances from which the proper inference is that the donor intended to make a gift in the future, but so that until something further was done to complete the gift he should retain the control over the thing intended to be given.

In the present case I may at once dispose of most of the affidavits. The reputation in the family and among the friends that it was Tom's or Alice's wine proves very little. Such a reputation would arise from the expression of his intention by the donor whether it was an intention to give at once or at some future time.

Now as to the wine claimed by *Tom Ridgway*. Eighteen or twenty years ago, soon after Tom's birth, Colonel *Ridgway* determined to lay down a pipe of port, and told the family and his friends that it was for Tom. It was however placed in the Colonel's

cellar and remained in his possession ; and occasionally a bottle of it was tried to test its condition. The bulk has not been drunk and is not yet ready to drink. It is suggested that the wine became Tom's when it was first laid down, and indeed it is clear that unless there was a gift then nothing has been done since to amount to one. I think however that the circumstances point to an intention to give in the future rather than to a present gift. The wine was useless to the child while he remained such, and he must at the time have been quite unconscious of any gift, and quite incapable of exercising any acts of ownership. Was it intended that when the boy got to be sixteen or seventeen he should be free to drink it at his pleasure, or to exchange it for a gun (for instance) or a horse ? I cannot think that anything of the kind was intended. In my opinion Colonel *Ridgway* had formed the intention of giving it to his son at some future time, without fixing in his own mind when that time should arrive, and had determined in the meantime to retain the control over it, and the power of dealing with it as circumstances might require.

Then as to the wine claimed by the daughter, *Alice Ridgway*. Having expressed his intention of giving Tom a pipe of port, Colonel *Ridgway* seems to have thought it only fair to his eldest daughter that she should have some wine, and he expressed his intention of giving her certain wine in his cellar, which was then in particular bins. His original intention was, as he says, to give the wine to *Alice* and *Jane* jointly, but he only expressed the intention of giving the wine to *Alice*, and so contrary to his real intention the wine acquired among his family and friends the reputation of being *Alice's*, and not that of *Alice* and *Jane*. Beyond the expression of intention nothing was done to change the property. The wine remained in Colonel *Ridgway's* cellar, and under his control, and though it was once moved, yet that was not done with any reference to the gift but simply for the more convenient arranging of the wine in Colonel *Ridgway's* cellar. The wine is still immature, and only a small part of it has been consumed by Colonel *Ridgway* and his friends, for the young lady does not drink port. Here again, if there was any present immediate gift, it was made when Colonel *Ridgway* expressed the intention of giving it and when *Alice* was a child, for nothing has been done since in any way to

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RIDGWAY,
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carry out the intention or to complete the gift if it was then imperfect. I feel myself compelled to come to the same conclusion in this case as in the case of *Tom's pipe*, and for the same reasons. If *Alice* had married I think Colonel *Ridgway* would have completed the gift by sending the wine to her, but I think that both his and her understanding of the so-called gift was, that she was not without some further consent on his part to be at liberty to sell it or give it away, but that, so long as she remained a member of his household, the wine as it matured was to be consumed by the family in the ordinary way.

In my judgment there never was in either case any intention on the part of Colonel *Ridgway* of making a present immediate gift, and both applications must be refused with costs.

Sidney Woolf:

I would ask your Lordship under the circumstances of this case to reconsider the question of costs.

Cave, J.:

I have not the slightest doubt but that the claim of the applicants in this case was made in the utmost good faith, and that they firmly believed they had a right to the wine. It is impossible also, under all the circumstances of the case, not to feel sympathy with them. But at the same time I do not think I ought to depart from the general rule. I am of opinion that the sympathy of a judge ought not to govern the decision as to costs.

Application refused with costs.

Solicitors: *Anderson & Sons*, for the applicants.

Parker, Garrett, & Parker, for the trustee.

Cases relied upon or referred to:—

Shower v. Pilck, 4 Exch. Rep. 478.

Irona v. Smallpiece, 2 B. & Ald. 551.

Little v. Willets, 55 Barbour, 125.

Ward v. Audland, 16 M. & W. 862.

Winter v. Winter, 4 L. T. 639.

In re Harcourt, 81 W. R. 578.

Lunn v. Thornton, 1 C. B. 879.

IN RE SINCLAIR, EX PARTE PAYNE.

BEFORE
MR. JUSTICE
CAVE.
1885.
AUGUST
4th and 10th.

Bankruptcy petition—Money paid by debtor to a solicitor to oppose petition—Right of trustee in bankruptcy.

On the presentation of a bankruptcy petition against a debtor, and an order for the appointment of an interim receiver having been made, such debtor instructed his solicitor to oppose the petition, and to move to rescind the interim order, and then paid to such solicitor at his request £25 on account of costs of counsel's fees, and other expenses for that purpose.

The application to rescind the interim order was dismissed, and the debtor was subsequently adjudicated bankrupt.

The trustee in the bankruptcy thereupon claimed the £25 from the solicitor as money received by him from the debtor with knowledge of the act of bankruptcy, on which the receiving order was made.

Held: That the application of the trustee must be refused : that it was right that a debtor should have legal assistance and advice against a bankruptcy petition: and that a debtor would be left practically defenceless if money paid to a solicitor for services rendered on such an occasion could afterwards be recovered by the trustee.

THIS was an application on behalf of the trustee in the bankruptcy of *Sinclair*, for an order directing one *G. Bathurst Norman*, a solicitor, to pay to such trustee the sum of 25*l.* received by him from the debtor, with knowledge of the act of bankruptcy, on which the receiving order was made.

On March 9th, 1885, a bankruptcy petition was presented against *Sinclair*, the act of bankruptcy alleged being that the debtor with intent to defeat and delay his creditors departed from his dwelling house and otherwise absented himself. (See the Bankruptcy Act, 1883, section 4, sub-section 1 (d).)

On March 10th, 1885, application was made to the Court for the appointment of an interim receiver under section 10, sub-section (1), of the Bankruptcy Act, 1883, which provides that, "The Court may, if it is shown to be necessary for the protection of the estate, at any time after the presentation of a bankruptcy petition, and before a receiving order is made, appoint the official receiver to be interim receiver of the property of the debtor, or of any part thereof, and direct him to take immediate possession thereof or any part thereof," and this application was granted.

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IN RE
SINCLAIR,
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PAYNE.

The debtor, *Sinclair*, thereupon consulted *Norman* as his solicitor, and instructed him to oppose the petition, and also to move to rescind the interim order.

Mr. *Norman*, however, informed the debtor that in order to do so he should require at least 25*l.* on account of the costs to pay counsel's fees and other expenses, and the debtor then paid him that sum.

On March 23rd, 1885, an application was made by *Norman*, acting as solicitor for the debtor, to discharge the order appointing the official receiver interim receiver, but the application was dismissed, and the debtor was subsequently adjudged bankrupt on the acts of bankruptcy alleged in the petition.

The trustee in the bankruptcy now sought to recover from Mr. *Norman* the 25*l.* which he had received.

F. C. Willis for the trustee in the bankruptcy.

The trustee is entitled to have this money repaid. Mr. *Norman* was fully cognisant of the acts of bankruptcy when he received it. The only explanation he gives is that he disposed of it in payment of counsel's fees. In the case of *In re Chapman, Ex parte Edwards* (see *ante*, Volume I., page 238), it was held, "That where the solicitor of the petitioning creditor, as his agent, had received from the debtor, between the date of the act of bankruptcy and the adjudication, various sums of money in consideration of several adjournments of the hearing of the petition, such solicitor was personally liable to refund such money to the trustee in the bankruptcy, even though it had been paid over or accounted for by such solicitor to the petitioning creditor before the date of the order of adjudication."

Herbert Reed for Mr. *Norman*:

There is nothing to show that this was the bankrupt's money. Moreover, I submit that there are certainly some exceptions to the rule that money paid away by an undischarged bankrupt can be recovered by the trustee. In the case of *Ex parte Dewhurst, In re Vanlohe* (L. R. 7 Ch. App. 185), it was held, that "Money received by an undischarged bankrupt, and paid away for value cannot be followed by the trustee, though the person to whom the money

was paid had notice of the bankruptcy." In that case Lord Justice JAMES said: "Dealings with uncertificated bankrupts have been going on for centuries, and this is the first attempt to follow into the hands of the person receiving it, money which has been paid away for value by an uncertificated bankrupt. . . . Where are claims of this nature to stop, if this were to be allowed?" And Lord Justice MELLISH said . . . "Another question arises, when the bankrupt has parted with money under such circumstances that he cannot claim it back." Dealings for value are protected, and the analogy of that case applies to this. Then, a mere carrier or conduit-pipe to pay money is not liable to the trustee. In the case of *Coles v. Wright* (4 Taunt. 198), "A trader in prison employed an auctioneer to sell goods, who sent him the proceeds by the hands of the defendant; the trader became bankrupt by lying two months in prison. It was held that his assignees could not recover from the defendant, who was a mere bearer, the money he had so received and paid over." Here the debtor was the hand to receive and pass on the money advanced by his friends to help him.

The present case is one of vital importance to solicitors.

CAVE, J. :

I am of opinion that this application must be dismissed. There Judgment appears to be no precedent for the application, and if I were to accede to it a debtor against whom a bankruptcy petition is presented would be placed in a very unfortunate position. It is only right that such a debtor should be able to obtain legal assistance and advice under such circumstances. But if money paid to a solicitor for services rendered in such a case could afterwards be recovered by the trustee in the bankruptcy a debtor would find himself practically defenceless. Nobody would act for him. The case of *In re Chapman, Ex parte Edwards*, which has been quoted, is not a case in point. There the money was paid by the debtor to the petitioning creditor's solicitor on account of the debt. Here it is paid to the debtor's own solicitor for counsel's fees and other expenses in defending him against the bankruptcy proceedings. It seems to me impossible to hold that whenever a solicitor who has received instructions to oppose proceedings in bankruptcy, does his work and is paid for his services, if the petition happens to be ultimately

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—
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1885. successful, the money which has been paid to him by the bankrupt may be recovered by the trustee in the bankruptcy. It might just as well be said that the rule would apply if a bankrupt goes into a baker's shop, who knows that he has committed an act of bankruptcy, and pays for a loaf. I am of opinion, therefore, that the application must be dismissed with costs.

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EX PARTE
PAYNE.

Application dismissed with costs.

Solicitors : *F. W. Henry* for the trustee in the bankruptcy.
G. Bathurst Norman.

Cases relied upon or referred to :—

Ex parte Chapman, In re Edwards, see *ante*, Volume I.
Page 288.

Ex parte Dewhurst, In re Vanlohe, L. R. 7 Ch. App. 185.
Coles v. Wright, 4 Taunt. 198.

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PRACTICE.

DIVISIONAL
COURT.
BEFORE
THE LORD
CHIEF
JUSTICE
and
MR. JUSTICE
CAVE.
1885.
August 11th.

IN RE ISAAC, EX PARTE ISAAC.

Bankruptcy Act, 1883, section 4, sub-section 1 (g).

Final judgment—Bankruptcy Notice—Set-off or Counterclaim.

A debtor against whom action was brought allowed judgment to go by default, but subsequently obtained leave to defend on payment of 43*l.* into Court, which he neglected to do.

Judgment was thereupon signed, and a bankruptcy petition presented, and the debtor having refused to give security for the debt as required by the Court, a receiving order was made.

On appeal by the debtor to set aside this order under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, on the ground that he had a counterclaim, set-off, or cross-demand, which equalled or exceeded the amount of the judgment debt, and which he could not set-up in the action in which judgment was obtained.

Held : That the debtor had had ample opportunity to set up the alleged set-off in the action, which he had neglected to do : and that the order of the County Court was a right order.

THIS was an appeal on behalf of the debtor *J. Isaac* to set aside a receiving order which had been made against him in the Swansea County Court.

The debtor *Isaac* was a builder and contractor, and the petitioning creditor *Siddon* was a painter and glazier.

On April 8th, 1885, a specially endorsed writ under Order XIV. was issued by *Siddon* against the debtor, in which he claimed the sum of 148*l.* 18*s.* 4*d.* for work done and goods supplied.

No appearance was entered by the debtor, and judgment was signed, but this was afterwards set aside on the application of the debtor, and leave to defend given on payment of 48*l.* into Court.

The debtor failed to make the required payment, however, and final judgment was obtained.

A bankruptcy notice was subsequently served upon the debtor ; and on June 24th a bankruptcy petition was presented.

On July 20th, the debtor having refused to give security for the petitioning creditor's debt, as suggested by the Court, a receiving order was made.

From this order the debtor now appealed, on the ground that there was a cross-account between the petitioning creditor *Siddon* and himself, and that he had a set-off or counterclaim which equalled or exceeded the petitioning creditor's debt, and which he could not set up in the action in which the final judgment was obtained.

Muir Mackenzie for the debtor.

The principal ground of appeal is that the debtor showed in evidence a set-off or counterclaim which equalled or exceeded the petitioning creditor's debt. Section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1888, provides that a debtor commits an act of bankruptcy, " If a creditor has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he

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has a counterclaim, set-off, or cross demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained." My contention is that in evidence there is such a set-off or counterclaim, and that the debtor could not set it up in the action. There was a cross-account. The debtor had an account against *Siddon*, which, after admitting his debt, shews a balance in favour of the debtor of something like 9*l.* The counterclaim was no after-thought of the debtor after judgment. There are letters which shew it was spoken of long before.

[CAVE, J.—How do you shew that the debtor could not avail himself of the set-off in the action ?]

If unconditional liberty to defend had been given to him he could have done so of course, but liberty was only given on condition of bringing 49*l.* into Court.

[CAVE, J.—That is not what is meant by the words "he could not set up." It means when the claim was not then due, or something of that kind. There is nothing to shew that the condition imposed was not rightly so. There was no appeal against it.]

The ground of appeal is that the debtor swears that against the claim for work and materials, he has a similar claim against the petitioning creditor.

THE LORD CHIEF JUSTICE (LORD COLERIDGE) :

Judgment.

It appears to me that this appeal must be refused. So far as I can see, the bankrupt is not within the Act. He must satisfy the Court that he has "a counterclaim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained." He has not satisfied me of either proposition—either that he has a set-off, or that he could not set it up. I certainly think that proceedings in bankruptcy ought not to be stopped on any pretext of this kind, and the appeal will be dismissed.

CAVE, J.:

I am of the same opinion. It would be a great misfortune if an appeal like this could succeed. The debtor here had abundant opportunity to set up the set-off. First he let judgment go by default. Then he got that set aside and leave to defend on bringing *43l.* into Court. He did not do so. This set-off could and ought to have been set up in the action. The debtor failed to do so, and is not within the section.

Appeal dismissed with costs.

Solicitor : *White* for the debtor.

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ISAAC.

IN RE PLAYER, EX PARTE HARVEY (No. 1).

DIVISIONAL COURT.

Bankruptcy Act, 1883, Section 47.

BEFORE
MATHEW, J.,
CAVE, J.,
and
WILLS, J.
1885.

August 12th.

Held : (1) That where a bankruptcy occurred after the coming into operation of the Bankruptcy Act, 1883, a settlement within section 47 of that Act is void, although made prior to the Act coming into operation.

(2) Where in the year 1880, the bankrupt purchased for his son certain shares in a ship which were registered in the name of the son at the time of and sold by him subsequently to the bankruptcy.

Held : That the transaction was a voluntary settlement within section 47 of the Bankruptcy Act, 1883, and void as against the trustee.

THIS was an appeal on behalf of the trustee in the bankruptcy of *Edward Player* from a decision of the deputy-judge of the Swansea County Court dismissing an application of such trustee for an order declaring that a gift made by the bankrupt to his son *Charles E. Player*, of a sum of money to purchase certain shares in the ship "Abercorn," was void against such trustee under

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section 47 of the Bankruptcy Act, 1883, which deals with the avoidance of voluntary settlements.

Section 47, sub-section (1), provides that "Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof."

And by sub-section (3) "'Settlement' shall for the purposes of this section include any conveyance or transfer of property."

The debtor who was adjudicated bankrupt in February last, purchased in the year 1880, certain shares in a ship called the "Atercorn," in the name of his son, *Charles E. Player*, who was the registered proprietor and always received the dividends of such shares, which he had sold for the sum of 450*l.*, and handed the proceeds over to his sister, *Clara H. Player*, subsequently to the bankruptcy, upon an implied trust for the benefit of their father and mother who were living apart.

E. Cooper Willis, Q.C., for the trustee.

By section 168 of the Bankruptcy Act, 1883, "Property" includes "Money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere: also obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined." This was a settlement within the meaning of section 47. It is a transfer of property. There has been no attempt to shew that the debtor was solvent at the time.

[MATHEW, J.: The only question seems to be whether the section is retrospective.]

That point is covered by authority. In the case of *Ex parte Dawson*, *In re Dawson* (L. R. 19 Eq. 483; 44 L. J. Bank. 49; 32 L. T. 102), which was a case decided on the corresponding section of the Bankruptcy Act, 1869, it was held that "Section 91 of the Bankruptcy Act, 1869, applies to settlements executed before, as well as after, the Act came into operation." A section of this nature has always been regarded as having a retrospective operation. In the case of *In re Salaman*, *Ex parte Salaman* (see *ante*, p. 61), the Court of Appeal held that the provisions of section 28 of the new Bankruptcy Act, which are of a quasi-penal nature, apply to the conduct of the bankrupt previous to the time when the Act came into operation.

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(No. 1).

Gye for C. E. and Clara H. Player.

I submit that section 47 is not retrospective in its operation, and that there are no words in it to make it so. Section 91 of the old Act was confined to traders. Further, settlement does not mean a gift of money. A mere gift ought not to come within the word settlement. The fact that payment of money is specially mentioned in section 48 shews that it is not to be included in section 47.

MATHEW, J.:

I am of opinion that the trustee must succeed in his appeal. Judgment. The first objection was that section 47 cannot be retrospective in its operation. Now the section has its history, and it is substituted for the section in the earlier Act. Section 47 takes the place of the former one, and provides that "Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser in good faith or for valuable consideration . . . shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts

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without the aid of the property comprised in the settlement" Mr. *Gye* proposes to read the section thus: "Any settlement of property except that heretofore made," &c. But in my opinion if we were to read it in that manner it would be reducing legislation to an absurdity. With regard to the other objection, I have no doubt but that this is a settlement of property within the section. The money was given to the son to be invested in shares, and the shares were in the son's name. The transaction is void against the trustee. The appeal must therefore be allowed, and *C. E. Player* and *Clara Player*, or one of them, must pay the 450*l.* and costs.

CAVE, J., and WILLS, J., concurred.

Appeal allowed, with costs.

Solicitors : *Tamplin, Taylor & Joseph*, for the trustee.
Smith & Lawrence, for the respondent.

Cases relied upon or referred to :—

Ex parte Dawson, In re Dawson, L. R. 19 Eq. 438 ; 44 L. J. Bank. 49 ; 33 L. T. 102.

In re Salaman, Ex parte Salaman, see *ante*, p. 61.

December 18th.

On this day an appeal against the above decision was in the paper for hearing in the Court of Appeal, but a settlement was arrived at before the case was called on, and no order was made by the Court. The settlement was in the following terms: "By consent, the trustee releasing Miss Player from all liability for costs or otherwise, vary order of Court below by striking out so much of order as directs her to pay any money or costs. And that no other order be taken on this appeal, save that the deposit be paid to the trustee in satisfaction of his costs of and incidental to this appeal and applications for leave as against *C. E. Player*."



IN RE PLAYER, EX PARTE HARVEY (No. 2).

DIVISIONAL COURT.

*Bankruptcy Act, 1883, section 47 and section 168.*BEFORE
MATHEW, J.,
CAVE, J.,
and
WILLS, J.
1885.*Settlement—Advance to son to start in Business.*

August 12th.

Where in the year 1882, more than two years before the bankruptcy, a bankrupt had advanced to his son the sum of 650*l.*, to enable the son to set up and carry on business, and the son himself brought in 150*l.* and carried on the business.

Held: That the transaction was not a voluntary settlement within section 47 of the Bankruptcy Act, 1883.

THIS was an appeal from a decision of the deputy Judge of the Swansea County Court dismissing an application by the trustee in the bankruptcy of *Edward Player* for an order declaring that an advance of 650*l.* made by the bankrupt two and a half years before the bankruptcy to his son *E. O. Player* for the purchase of certain building stock to enable the son to carry on business, was void as against the trustee under section 47 of the Bankruptcy Act, 1883, which relates to voluntary settlements: and that *E. O. Player* should be ordered to pay to the trustee such sum of 650*l.*

E. Cooper Willis, Q. C. (F. C. Willis with him) for the trustee.

In this case two and a half years ago another son was about to start in business. The father advanced 650*l.* for the purchase of stock. The son brought in 150*l.* The son carried on the business and lived with the father. At the time of the bankruptcy the stock was reduced to the value of about 350*l.* The trustee is willing to give the son credit for 150*l.* if he will pay over 200*l.* balance.

[MATHEW, J.: You must make out the claim of the trustee.]

This is a transfer of "money" which is included by section 168—the interpretation clause—in "property." As in the case of purchase of shares it can be traced. It formed a great part of the

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EX PARTE
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(No. 2).

Judgment.

capital of the business. Although the actual stock may have changed it represents part of the original advance.

MATHEW, J.:

I am of opinion that this appeal of the trustee must fail. The argument is that the trustee is entitled to follow a sum of money advanced by a father to his son to set him up in business more than two years before the bankruptcy. The trustee says that if at the time of the bankruptcy any part of the capital can be shewn to be left he has a right to call for it to be refunded. If that is so it is singular that the proposal of Mr. *Willis* on behalf of the trustee was so moderate. The transaction was not a fraudulent one. It was a gift of money to be employed in a venture—in business. Does that come within the Act? It is said to be void because it is a voluntary settlement. But in my opinion if such a transaction as this were included it would be a great hardship. If a sum of money is given by a father to a son to support himself, could it be recovered from the unfortunate son? The only argument that can be put forward in favour of such a contention is that in section 47 the word "property" is used. But in my opinion what was meant is not to include a gift of money, but that where money is settled as property the money may be recovered as the property would. It was not intended that every gift of money could be recovered within ten years. Then it was said that the money here could be followed. But such a following is clearly not meant by the section. Was it meant to have a fine argument in every case whether the money was a part of the money originally given or part of the profits? Certainly not. It is a question whether the balance left is not part of the profits made by the son by his own industry after the original capital had been expended. The appeal must be dismissed.

CAVE, J.:

I am of the same opinion, and that opinion is much strengthened when I look into the history of the clause in question. In the Act 1 Jas. I. c. 15, there was a section which invalidated voluntary transactions, and in 1802 the case of *Ex parte Shorland* (7 Ves. 88)

was decided on that section. In that case it was held that a mere gift by way of advancement to a son was not void by 1 Jas. I. c. 15, s. 5, where the words used are "convey or procure, or cause to be conveyed." Next we find the case of *Kensington v. Chantler* (2 M. & S. 36)—that was in 1813, and it decided that money advanced and boats given to a son to start him in business were not void as a voluntary settlement. Lord Ellenborough said, "The doctrine contended for would go the length of making a son liable to refund every portion of money given to him by his father for his maintenance." Then we have section 126 of the Act of 1849, in which the word "money" does not occur. Then comes the Act of 1869, the section of which is substantially similar to that contained in the Bankruptcy Act, 1883. What is contended is that the word "property" in section 47 does by the interpretation clause include "money" and therefore that every gift by a father to his child which could be followed would be liable to be made void by the bankruptcy of the father. It would be a strong measure to say that this should be, and especially when the reason for such a decision is founded not on the section itself, but is introduced by the interpretation clause which applies to all the Act. On the section itself it is in my opinion clearly not intended to give the word the interpretation given in that 168th clause. The word to look at is "settlement." It means that "settlement" shall not be confined to ordinary formal settlements commonly so called, but may include any transfer of property. But settlement must be the end and purpose of the transaction, that is, the preservation of the thing, whatever its form, for the enjoyment of another person. Thus, in the last case the purchase of shares for a son is within the meaning of the word "settlement." But when you come to a case of money, where there is a mere ordinary gift, I cannot see my way because of a change in the interpretation clause to give to section 47 the interpretation which similar sections never had before, and to bring about the far-reaching and cruel consequences which must result if it applied to every gift of a father to his child.

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WILLS, J.:

I am of the same opinion. I have nothing to add.

Appeal dismissed with costs.

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EX PARTE
HARVEY
(No. 2).

Solicitors: *Tamplin, Taylor & Joseph*, for the trustee.
Smith & Laurence for the respondent.

Cases referred to:—

Ex parte Shorland, 7 Ves. 88.

Kensington v. Chantler, 2 M. & S. 36.

BEFORE
MR. JUSTICE
CAVE.
1885.

October 27th.

IN RE TAYLOR, EX PARTE DYER.

Bankruptcy Act, 1883, section 44, sub-section (iii.).

Reputed ownership—Purchaser's goods in vendor's warehouse—Custom of particular trade.

Held: That a custom exists in the hop trade for hop merchants to retain in their warehouse hops purchased by their customers, so as to prevent the operation of the order and disposition clause—section 44, sub-section (iii.)—of the Bankruptcy Act, 1883.

At the time of the presentation of a bankruptcy petition by the debtor, who carried on business as a hop and seed merchant, there were lying in his warehouse certain pockets of hops which he had sold to the applicant. The hops were left there for the convenience of the purchaser, and had been duly paid for. It was proved to be the custom of the hop-trade for hops sold to remain in the warehouse of the merchant to the order of the purchaser, and that no person familiar with the hop-trade would suppose that all hops lying in a hop merchant's warehouse were the property of such merchant.

Held: That the existence of a custom of this nature, shewn to be well known amongst persons concerned in the hop-trade, excluded the doctrine of reputed ownership, and that the hops did not pass to the trustee.

THIS was an application on behalf of *J. T. Dyer*, maltster, of Bristol, for an order declaring that nine pockets of hops now in the possession of the trustee in the bankruptcy of *J. F. Taylor*, were the property of the applicant, and that such trustee might be ordered to deliver up to him the said hops.

The case raised the important question whether a custom existed

in the hop trade for hop merchants to retain in their warehouse hops purchased by their customers, so as to prevent the operation of the order and disposition clause—section 44, sub-section (iii.)—of the Bankruptcy Act, 1883.

In October, 1884, eleven pockets of hops were purchased by *Dyer* from the bankrupt *Taylor*, who carried on business as a hop and seed merchant in the Borough High Street. Two of these pockets were delivered, the remaining nine being left to the order of the purchaser in the warehouse of the debtor.

The hops were paid for by bill dated October 18th, 1884, for the sum of 111*l.* 18*s.* 4*d.*, which was duly met at maturity.

On January 20th, 1885, the debtor *Taylor* filed his petition, the nine pockets of hops being still in his warehouse, and on February 18th he was adjudicated bankrupt.

On March 26th, 1885, a Mr. *Feast* was appointed trustee in the bankruptcy, against whose claim to the said hops the purchaser *Dyer* now applied to the Court.

F. C. Willis for Mr. *Dyer*.

The hops were left in the warehouse because the purchaser had not room for them. When they were taken possession of by the official receiver they were not sold owing to Mr. *Dyer's* protest. It is a well-known custom for hop merchants thus to retain the hops. I propose to call ample evidence.

[*F. C. Strachan*, hop merchant, 21, Hop Exchange, Borough, said, "I have been a merchant for seven years, and have been twenty-five years in the trade. Sometimes when hops are bought they are to wait the orders of the customer, and then they remain in the warehouse. Sometimes they are taken away."

J. Stadden said, "I have been a hop-factor for thirty-five years. When hops are purchased, the purchaser leaves them in the hands of the merchant if they are not wanted, and an entry is made in the invoice book and at the bottom of the invoice."

Arthur Gill said, "I have been a hop-factor for twelve years, and am a creditor against *Taylor* for 1000*l.* When hops are purchased of a hop merchant, if they are not delivered, they are weighed off within fourteen days and then kept to the order of the

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purchaser. If I went into a merchant's warehouse I could not know which hops belonged to him, and which to other people, but I certainly should not expect that all the hops there belonged to the merchant. After fourteen days warehouse rent and insurance is usually charged except to brewers."]

Sidney Woolf, for the trustee in the bankruptcy.

I do not propose to call any witnesses, but I submit that the evidence before the Court is not sufficient to establish the custom. Only three witnesses have been called, and two of those are factors, who are not the same as the bankrupt, who was a merchant. There was nothing to distinguish these goods from the merchant's stock.

[CAVE, J.: The gist of the matter seems to be that one familiar with the hop trade says he should not believe all the hops appearing in a warehouse belonged to the merchant.]

CAVE, J.:

Judgment.

I am of opinion that the custom is made out. The evidence brought forward is uncontradicted. The evidence of the first witness was not very strong, but the last one says, that if he went into a hop merchant's warehouse he should not suppose all the hops he saw there belonged to the merchant. He should come to the conclusion that some of the hops had been sold and belonged to other persons. If that be so, no man in his senses would give credit upon the strength of the hops appearing in the warehouse. I am of opinion, therefore, that the hops claimed were not in the order and disposition of the bankrupt within the meaning of the statute, and the motion will be allowed with costs.

Motion allowed with costs.

Solicitors: *Meredith & Co.* for Mr. Dyer.

Coburn & Young for the trustee.

PRACTICE.

IN RE LENNOX, EX PARTE LENNOX.

Bankruptcy Act, 1883, section 7.

Application for receiving order—Judgment debt—Power of Court to enquire into consideration for judgment.

COURT OF
APPEAL.

BEFORE THE
MASTER OF
THE ROLLS,
COTTON, I.J.,
LINDLEY, L.J.
1885.

*November 6th
and 7th.*

Held: (1) That upon a petition by a judgment creditor for a receiving order, the Court of Bankruptcy has power, at the instance of the judgment debtor, to go behind the judgment and to enquire into the consideration for the judgment debt, even though the debtor has consented to the judgment.

(2) If on the hearing of the petition evidence is put forward of such facts, which, if proved, would shew that, notwithstanding the judgment, there is by reason of fraud or otherwise, no real debt, the Court ought not to make a receiving order without enquiry into the truth of the facts alleged.

THIS was an appeal from an order of Mr. Registrar Hazlitt making a receiving order against the debtor Lord G. Lennox.

In August, 1884, a writ was issued against the debtor on two promissory notes dated April 5th, 1883, for 1000*l.* and 500*l.* respectively, of which the plaintiff alleged that he was the indorsee for value from the person to whom the notes were originally given. The plaintiff claimed 1500*l.* with interest and costs.

The defendant by his statement of defence alleged that no consideration was given to him for the making of the notes, and that the plaintiff always knew that this was so: that the notes were indorsed to the plaintiff by the person to whom they were given at his request in order that the plaintiff might make use of them for his benefit temporarily upon an agreement that the plaintiff should retire the notes, and that the defendant should not be called upon to pay them: and that no value was given by the plaintiff for the indorsement of the notes to him.

The action came on for trial, but the defendant thereupon withdrew his defence, and an order was drawn up in the following terms: "By consent it is ordered that the statement of defence and the pleadings herein be withdrawn and that the defendant do

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pay to the plaintiff the sum of 1600*l.* and taxed costs. The defendant to have a month to pay the amount."

The money was not paid, however, and a bankruptcy petition founded on the order for judgment was consequently presented against the debtor.

At the hearing of this petition the debtor was desirous of cross-examining the petitioning creditor as to the validity and circumstances of his alleged debt, but it was held by the learned registrar that the defendant was, under the circumstances, bound by the judgment, and that the Court could not at his instance enquire into the validity of the debt; and a receiving order was in consequence made.

From this decision the debtor Lord G. *Lennox* now appealed.

Winslow, Q.C. (*& B. Terrell with him*) for the appellant.

In bankruptcy everything is open to inquiry. If the creditor has obtained a judgment, this is *prima facie* evidence of the debt, but it is not conclusive. The Court may, if the circumstances warrant it, enquire into the consideration for the judgment. (*Ex parte Marson*, 3 M. & A. 55; 42 L. T. 162.) The fact that the creditor has obtained a judgment is not conclusive evidence of debt, and it will not preclude the trustee from enquiring whether a debt is really due. (*Ex parte Bryant*, 1 V. & B. 214.)

[COTTON, L. J.: There seems to be no doubt on a question of proof.]

Then in *Ex parte Kibble, In re Onslow* (L. R. 10 Ch. App. 373): "The 2nd section of the Infants Relief Act, 1874, which enacts that no action shall be brought on any ratification made after full age of a contract made during infancy, applies to ratifications made after the passing of the Act, of contracts made before that time. An infant before the passing of the Act gave a bill of exchange, payable after his majority, to a jeweller in payment for jewelry. After his majority and after the act came into operation, the creditor obtained judgment by default against him in an action on the bill of exchange, and then took out a debtor's summons, and on his failing to comply with it, filed a petition for adjudication against him. Held, that the Court of Bankruptcy would look into

the consideration for the judgment ; and that if the conduct of the debtor, in allowing judgment to go by default against him, operated as a ratification of the bill of exchange, such ratification was rendered void by the 2nd section of the Act ; and the petition for adjudication was consequently dismissed." (Counsel also referred to *Ex parte Banner, In re Blythe*, L. R. 17 Ch. Div. 480 ; 44 L. T. 908 ; *Ex parte Ritso, In re Ritso*, L. R. 22 Ch. Div. 529 ; 52 L. J. Ch. 535 ; 48 L. T. 376.)

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R. Vaughan Williams for the petitioning creditor.

Is it to be said that in all cases there is the right to go behind the judgment ? If not, where is the line to be drawn ? I admit that the Court of Bankruptcy has the right to go behind a judgment, and we must see when the court will exercise that right. In *Ex parte Kibble, In re Onslow*, the Court went behind the judgment, and went behind it at the instance of the debtor. The line is not, therefore, the case of a trustee and a proof. The line, I submit, is this. *Prima facie* the judgment will be sufficient proof of the debt and of the consideration, and the Court will not go behind it unless the debtor shows fraud or something of that kind on the part of the judgment creditor. Now as to the facts of this case. The debtor got leave to defend the action. He delivered his defence, and the action was actually ready for hearing. The defendant at the last moment consented to an order being made by the Court, which could only be made if the defences which he now is desirous of setting up were withdrawn. What I say is that the Court of Bankruptcy has doubtless jurisdiction to go behind a judgment on the application of the debtor or of the trustee, but it will not do so on behalf of the debtor unless the case is much stronger than in a case where a trustee applies. (Counsel referred to *Ex parte Mudie, In re James*, 3 Mon. Dea. & De Gex, 66 ; *Ex parte Prescott, In re Prescott*, 1 Mon. Dea. & De Gex, 199 ; *Ex parte Anderson, In re Tollemache*, L. R. 14 Q. B. D. 606.) In practice a debtor against whom there is a judgment cannot go behind that judgment except he can show especial circumstances, or in case of public policy that he should go behind it. Here it must not be forgotten the debtor consented to the judgment.

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Judgment.

THE MASTER OF THE ROLLS (LORD ESHER) :

In this case the authority and power of the Court of Bankruptcy was vouched on the part of a judgment creditor to order that a receiving order be made against a judgment debtor : and the authority of the Court of Bankruptcy thus vouched is given to it by section 7 of the Bankruptcy Act, 1883. The case being thus before the registrar, and it being admitted that there was a judgment, it was suggested on behalf of the debtor that the registrar ought not to make a receiving order : that although there was a judgment, yet the debt on which the judgment was obtained never really existed : that the debt was founded on fraud, and that that fraud could be brought home to the judgment creditor. The registrar was of opinion, however, that because there was a judgment, and because the application was made at that stage of the proceedings, and by the debtor, he could not go behind the judgment. There arise, therefore, two questions : First, was that a right view ? And then, If not, were the circumstances in this case such as to justify the Court in going behind the judgment ? Now I find that by section 7, sub-section (3) of the Bankruptcy Act, 1883, "If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition." What is the proof of the petitioning creditor's debt here ? It is the judgment. But if the Court is not satisfied with the proof, it may dismiss the petition. Again, if the Court thinks for "other sufficient cause" no order ought to be made, it may dismiss the petition. So there are two grounds in a case like the present on which a petition may be dismissed. But it was argued that notwithstanding these words the Court *must* be satisfied if there is a judgment by consent. It was said that if the judgment had gone by default it would be different, but that if it is by consent the Court must be satisfied. It seems to me that the question is not what is the mere right of the debtor or creditor, but whether the Court ought to exercise that great power and authority which is given to it, when it has the strongest grounds to believe that there is no petitioning creditor's debt, when it has the strongest doubts as to the validity of the debt so put forward. The whole

foundation of the matter is, that the Court exercises its discretion on a petitioning creditor's debt. It is not denied that at another stage of the proceedings, if this allegation is made by another creditor, it will be enquired into. In my opinion it would put the Court of Bankruptcy in a false position, unless full discretion is given to it. So far as the debtor is concerned, it might be said that it was his own fault. Why did he consent? But I certainly think the Court ought to be allowed to enquire into the matter, not only at a subsequent stage of the proceedings, but in the first instance. The case of *Ex parte Kibble, In re Onslow* (L. R. 10 Ch. Ap. 373), appears to be a direct authority for the reasons which I have endeavoured to express. The principle is, that the Court of Bankruptcy has the right to see it is not put in motion when there is no debt at all. It is not true to say that the mere fact of the existence of a judgment ought to prevent the Court from going into the enquiry; and although by consenting to a judgment, the debtor is estopped everywhere else, no such estoppel is effective against the Court of Bankruptcy. There is no such estoppel against the Court of Bankruptcy. A judgment is *prima facie* evidence of the debt: a judgment to which the defendant has consented, is far stronger than an ordinary judgment; but upon certain allegations being made, the Court is entitled to enquire into the allegations as to the original debt, and is bound to do so on a sufficient case being made out. Now as to the circumstances which would justify such an enquiry. They must, of course, vary in each case, and if the registrar be of opinion that if the circumstances alleged in any particular case were proved true, even then, they would not be sufficient to cause him to disregard the judgment, he would refuse to go on. But if the circumstances alleged are such that, if proved, they show there is no debt at all: if they show that what was alleged to be a debt was a mere fraud, it is monstrous to suppose that the Court of Bankruptcy would stop then; that it is bound to say that, notwithstanding those facts, it is "satisfied" that a receiving order ought to go. Of course, as I have said, in a case where there is a judgment by consent, the Court will naturally lean in favour of the creditor. Putting the case thus, therefore, I think that the registrar here, in the face of the facts put before him, that the bills were used fraudulently, with full knowledge of

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the fraud on the part of the petitioning creditor, and that the debtor never received one sixpence of consideration for them, was wrong in his decision. The case must be remitted back to the registrar in order that the necessary enquiry may be made.

COTTON, L. J.:

The case is one of considerable importance. The debtor here has said that although the judgment was obtained by consent, as a matter of fact the petitioning creditor obtained the judgment in respect of a claim which was no debt at all; that it was made on a fraud. Now it has long been established that a trustee on behalf of creditors may go behind a judgment. No consent or collusion of the debtor can prevent the trustee so doing. That principle does not apply, however, to the present case; we are not dealing with a proof. But the case of *Ex parte Kibble, In re Onslow* (L. R. 10 Ch. Ap. 373), is an authority that the Court will enter into an enquiry as to the validity of a judgment debt at the instance of the debtor himself upon an application to adjudicate him a bankrupt. The Court is not bound to make a receiving order if it is not satisfied with the proof of the debt, or if there is other sufficient cause for the dismissal of the petition. I am of opinion that the powers of the Court of Bankruptcy ought not to be put into force on a debt which is said not to be a true one. We say nothing as to whether the objections alleged will be established, but we say that the matter ought to be enquired into. The receiving order which has been made will be reversed, therefore, and the case will be referred back for enquiry.

LINDLEY, L. J.:

I am of the same opinion. It is by no means a matter of course that a judgment creditor should be entitled to have a receiving order against the judgment debtor. Bankruptcy proceedings are a very serious matter, not only against the debtor but also against the other creditors. It is the duty of the Court to see at whose solicitation it is going to make the receiving order. Section 7, subsection (3) of the Bankruptcy Act, 1883, is explicit in its terms, and in *Ex parte Kibble, In re Onslow* (L. R. 10 Ch. Ap. 373), Lord Justice MELLISH said: "It is quite clear that in the Court

of Bankruptcy, the consideration for a judgment may be investigated, particularly when the judgment has gone by default The real question must always be whether there was a good consideration for the debt. . . .” It is my clear opinion that the Court of Bankruptcy will not be used to enforce debts which are not real, even though they may be in the form of a judgment.

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Receiving order rescinded, and case remitted for enquiry.

Solicitors : *H. W. Chatterton* for the appellant debtor.

C. F. Emmott for the petitioning creditor.

Cases referred to or relied upon :—

Ex parte Marson, 3 M. & A. 55 ; 42 L. T. 162.

Ex parte Bryant, 1 V. & B. 214.

Ex parte Kibble, *In re Onslow*, L. R. 10 Ch. App. 373 ; 44 L. J. Bank. 68 ; 82 L. T. 138.

Ex parte Banner, *In re Blythe*, L. R. 17 Ch. Div. 480 ; 44 L. T. 908.

Ex parte Ritso, *In re Ritso*, L. R. 22 Ch. Div. 529 ; 52 L. J. Ch. 585 ; 48 L. T. 376.

Ex parte Mudie, *In re James*, 3 Mon. Dea. & De Gex, 66.

Ex parte Prescott, *In re Prescott*, 1 Mon. Dea. & De Gex, 199.

Ex parte Anderson, *In re Tollemache*, L. R. 14 Q. B. D. 606.

BEFORE
MR. JUSTICE
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IN RE GILLESPIE, EX PARTE ROBERTS.

Bankruptcy Act, 1883, sections 37, 39, and schedule 2.

November 9th. Proof—Proof for re-exchange—Foreign bill payable in London—Bankruptcy of acceptors—Bills of Exchange Act, 1882, section 57.

Where six bills of exchange were drawn in Tobago, accepted by the debtors, and made payable at the London and Westminster Bank, but were subsequently dishonoured, and thereupon sent back to Tobago, and taken up by the drawers who sought to prove for the re-exchange against the debtor's estate.

Held: That subject to the damages being proved, the claim ought to be admitted: that the re-exchange mentioned in section 57 of the Bills of Exchange Act, 1882, was simply the difference between English and foreign currency, and that under that Act the claim was still admissible.

THIS was a motion to reverse the rejection by the trustee in the bankruptcy of Messrs. *Gillespie & Co.* of part of a proof by one *Roberts* to the extent of 311*l.* 14*s.* 0*d.*

The proof in question was on six bills of exchange for 500*l.* each, and other items, making up the 311*l.* 14*s.* 0*d.* in dispute, and composed of notarial expenses, commission and re-exchange incurred under the following circumstances:—

The bills in question were drawn in Tobago by the executors of one *Keen* in favour of a Mrs. *Horsburgh*. They were accepted by the debtors and made payable at the London and Westminster Bank.

The bills were subsequently transferred to the Bank of Scotland, and were dishonoured.

They were thereupon sent back to Tobago and taken up by the drawers, who alleged that they became liable for the re-exchange and other expenses for which they were entitled to prove against the debtor's estate.

The proof was rejected by the trustee, and application to reverse this decision was now made to the Court.

Herbert Reed in support :

By an Act of the Island of Tobago passed on the 5th of December, 1859, the rate for which the drawers are liable is fixed at 10 per cent. I have an affidavit by the Attorney-General of the island to the effect that that is the amount payable for re-exchange. The drawers are entitled to an indemnity. (*Chalmers on Bills of Exchange, Articles 209, 213*).

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Cohen, Q.C. (Yate Lee with him) for the trustee :

I do not deny that before the Bills of Exchange Act the acceptor is liable for re-exchange provided that the re-exchange has been paid.

Herbert Reed :

Then I will come to Section 57 of the Bills of Exchange Act to which, I take it, my friend refers. That section provides that "Where a bill is dishonoured, the measure of damages which shall be deemed to be liquidated damages, shall be as follows :—(1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser (a) the amount of the bill ; (b) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case ; (c) the expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of the protest. (2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment." It is impossible to say that subsection (2) is exhaustive. Here the proof for noting and commission was rejected. That is clearly wrong.

Cohen, Q.C. : I admit that.

Herbert Reed : All reasonable expenses to which the drawer

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is put by the acceptor's default ought to be paid. In *Francis v. Rucker* (Ambler, 672), "There being a law in Pennsylvania, that bills drawn or indorsed there on persons in England, and protested, should be paid to the holder with 20 per cent. for damage. Bills drawn on a merchant in England were accepted by him. He then becoming bankrupt before they were due, they were protested for non-payment. The drawer having paid the money due on the bills, and the 20 per cent. to the holder, was permitted to prove under the commission." Also in *Walker v. Hamilton* (1 De G. F. & J. 602), "A drawer in Louisiana of bills of exchange upon acceptors in London held entitled to prove under a deed of arrangement executed by the latter, upon their becoming insolvent, to their creditors, not only for the amount of the bills, but also for 10*l.* per cent. upon that amount in lieu of re-exchange, which, by the law of Louisiana, he had been obliged to pay to the holders of the bills on their return dishonoured and protested for non-payment in Louisiana." And in the more recent case of *In re General South American Company* (L. R. 7 Ch. Div. 637 ; 37 L. T. 599), it was held that "the drawer of a bill of exchange in a foreign country accepted in England is entitled, upon the bill being dishonoured and protested, to recover from the acceptor not only the amount of the bill with interest, but also all such reasonable expenses as may have been caused by the dishonour, including the expenses of re-exchange." On all these cases I submit that it is straining the Bills of Exchange Act to say that Section 57 contains every case in which it is possible to prove for re-exchange.

Cohen, Q.C. : Proof for re-exchange is excluded except in cases mentioned in section 57 of the Act. Another important point is the fact of payment. In the cases cited stress was laid upon the argument that re-exchange is payable where the party who sues has actually paid. Further, re-exchange can only occur properly where a person in this country accepts bills payable abroad.

November 16th.

CAVE, J. :

In this case the applicant sought to prove against the estate of the bankrupts in respect of certain bills of exchange, about which

no question now arises,—and also for what was called re-exchange at the rate, defined by the statute of the island of Tobago, of 10 per cent. The first question which arises is whether previous to the passing of the Bills of Exchange Act damages of this kind could be recovered by the drawer from the acceptor. The cases dealing with the question are somewhat numerous, and are not altogether to the same effect, but after the decision of the Court of Appeal in *Walker v. Hamilton* (1 De G. F. & J. 602), it is impossible to hold that an action for damages on the re-exchange of the bill could not have been maintained against the acceptor. There are several cases referred to in the judgments given in that case. Then came the Bills of Exchange Act, and it follows that unless there is something in that Act inconsistent with the law which existed before, the old right continues in force. Section 57 of that Act lays down the measure of damages, which are to be treated as liquidated in connection with a dishonoured bill. It provides that "Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:—(1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser,—(a) the amount of the bill: (b) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case: (c) the expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest. (2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment." Now in the first place the re-exchange there mentioned in the section is not the same as that we are now dealing with. The re-exchange there mentioned is merely the difference between English and foreign currency which is represented by the bill in the case of a foreign bill. Suppose, for instance, that there is a bill dishonoured abroad, say in America,

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and drawn in dollars, the currency there, the person suing here upon such a bill may recover from the drawer the amount of the re-exchange, that is, the amount in English money represented by 1000 dollars at the time when the bill was due. The section simply intends to provide for what damages may be treated as being liquidated damages for the purpose of being specially indorsed on the writ, and it does not intend at all to take away the right which the drawer had to recover from the acceptor any special damage of an unliquidated character which he could prove that he had sustained. The character of the damages in this case is unliquidated, for although the statute of the Island has fixed them at 10 per cent., the person seeking to recover must show that he has sustained damage. The exchange was so constantly against Tobago that the legislature fixed 10 per cent. as the measure of difference on re-exchange, but it is necessary to prove that the damage has been actually sustained. The person seeking to recover must show either that he has paid the amount or is compelled and made liable to do so. In this case the argument was chiefly directed as to whether there was this liability to pay. It was alleged that the drawer although he had not paid the amount of the re-exchange was liable for it. But I am not quite satisfied that the evidence on this point was conclusive, and if the trustee wishes to raise this question the case must go into the paper again. If not the result will be that the appeal must be allowed with costs.

Yate Lee : On behalf of the trustee I will at once state that he does wish to raise this point.

CAVE, J. :

Then the case will have to go into the paper again for further evidence.

Order accordingly.

Solicitors : *Lowless & Co.*, for Mr. Roberts.

Druces, Jackson & Atilee for the trustee.

Cases referred to or relied upon :—

Francis v. Rucker, Ambler, 672.

Walker v. Hamilton, 1 De G. F. & J. 602.

In re General South American Company, L. R. 7 Ch. Div. 637; 37 L. T. 599.

IN RE GENESE, EX PARTE THE DISTRICT BANK.

BEFORE
MR. JUSTICE
CAVE.
1886.

Bankruptcy Act, 1883, sections 37, 39, and schedule 2.

Proof—Proof by wife of bankrupt for loan out of her separate estate—Married Women's Property Act, 1882, section 3.

Held: That under the provisions of the Married Women's Property Act, 1882, a wife who advances money to her husband out of her separate estate is not entitled, on the bankruptcy of the husband, either to prove or vote until all the other creditors of the bankrupt have been satisfied.

In such case it lies on the wife to show that the money has not been advanced to the husband for the purposes of his business.

THIS was an application to expunge the proof of Mrs. Sarah Genese, the wife of the bankrupt, for a sum of 384*l.* 1*s.* 10*d.*, being money advanced by her to her husband out of her separate estate.

The ground of objection was that the wife was not entitled either to prove or vote until all the other creditors of the bankrupt had been satisfied.

Vaughan Williams in support.

The objection is a purely legal one. Section 3 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) provides that, "Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied." Such postponement applies to married women who have separate property the principle of the Partnership Act of 1865 (28 & 29 Vict. c. 86), commonly called Bovill's Act. Upon that the case of *Ex parte Taylor, In re Grason* (L. R. 12 Ch. Div. 366) was decided, in which it was held that "the effect of

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1885. section 5 of Bovill's Act is to prevent the lender of money to a trader, on the terms of receiving a share of the profits of his business, from proving for the loan in the bankruptcy of the borrower in competition with any of his creditors—not merely those creditors whose debts were contracted in relation to the business in respect of which the loan was made, or while that business was being carried on—but any of the creditors who are entitled to prove in the bankruptcy. Till all the other creditors have been paid in full, such a lender is not entitled to prove for any purpose whatever." Substantially the sections in the two Acts are identical, and the reasoning in one is the same as in the other.

E. Cooper Willis, Q.C. (H. Kisch with him), for Mrs. Genese.

The new Act does not intend to alter the old law more than is necessary. When the husband was trustee for the wife, a proof could be made in a case of the husband's bankruptcy. In the case of *Ex parte Wells, In re Whitmore* (2 Mon. Dea. & De Gex, 504), "Feme covert petitioning by her next friend, was permitted to prove the value of a legacy of stock bequeathed to her separate use, but transferred into the name of her husband, who sold it out and became bankrupt, and a trustee was appointed to receive the dividends." There are many other cases where a husband holds the wife's separate property, the right of proof was allowed against the estate in respect of such separate property. It was not suggested before the Married Women's Property Act, 1882, that a married woman who had lent money could not prove for it. Now the Act of 1882 does modify the old law, but it only interferes with it so far as is necessary to give effect to the words of the section. That refers to such property as can be treated as assets of his estate. The word "assets" has a distinct meaning in bankruptcy. In section 16 of the Bankruptcy Act, 1883, a debtor is required to make out a statement of his affairs, showing the particulars of his assets, debts, and liabilities, &c. In the clause relied on the words refer simply to property which can be treated as assets. They do not refer to cases where there has been a prior loan, and the money has gone long ago. Under Bovill's Act the rule was altogether different. The proper interpretation of the clause is not to take away the right of a wife to prove for money lent years ago which

has gone. It only operates when the money can be said to be assets. Then as to the question of the money being lent for the purposes of trade or business. There is no evidence of that. It is for the other side to show that the money was used for trade or ~~The District Bank.~~

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CAVE, J. :

The only question really is who ought to pay the costs of this Judgment motion. Incidentally, however, I have to decide the other question. I am clearly of opinion that it is quite impossible to put on section 3 of the Married Women's Property Act the construction which Mr. Willis puts upon it, and has contended for. The proof must be expunged. As to the other point, I am of opinion that it lies on the wife to show that the money was not advanced for the purpose of business. As she has not done so, Mrs. Genese must pay the costs of the motion.

Application allowed with costs.

Solicitors : *Wright & Co.*, for the District Bank.

A. E. Rosenthal, for Mrs. Genese.

Cases relied upon :—

Ex parte Taylor, In re Grason, L. R. 12 Ch. Div. 366.

Ex parte Wells, In re Whitmore, 2 Mon. Dea. & De Gex, 504.



BEFORE
MR. JUSTICE
CAVE.
1885.

IN RE GARNETT, EX PARTE THE OFFICIAL RECEIVER.

Bankruptcy Act, 1883, section 24.

November 10th. Duties of debtor as to discovery and realisation of property—Personal examination—Medical examination for insurance.

Where application was made under section 19 of the Bankruptcy Act, 1869 (*see section 24 of the Bankruptcy Act, 1883*), for an order upon a debtor to answer certain enquiries and to submit to a medical examination for the purpose of life insurance.

Held: That the provisions of the section apply to an examination of the debtor in respect of property : and that the Court could not under the section make an order for the personal examination of the debtor as to the state of health, with a view to insurance.

THIS was an appeal from an order of the learned judge of the Nantwich County Court dismissing an application made on behalf of the official receiver of the district that the bankrupt might be ordered to answer certain questions under the following circumstances.

The bankrupt, *Fanny Pamilla Garnett*, is a widow, the debts amounting to 400*l.*, and the only asset being a life interest in the sum of 872*l. 7s. 10d.* invested in Consols for the joint benefit of the bankrupt herself and two children.

This life interest it was desired to realise, but the same was found to be practically unsaleable unless the bankrupt's life should be insured.

The life insurance companies, however, required an examination by a medical man of the person whose life it was proposed to insure, and they also required that certain enquiries should be answered by that person as the basis of the insurance.

On Mrs. *Garnett's* refusal, the learned County Court Judge declined to make any order directing her to comply with these requirements. The judgment stated, "I must have some authority to direct Mrs. *Garnett* to go before the doctor of a life insurance company and submit to an examination. That was distinctly

stated as an absolute necessity. The section does not give me any authority. The trustee has got the life interest and must make the most of it. I cannot enforce a medical examination, and I simply refuse to make the order asked for."

From this decision the official receiver now appealed.

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W. F. Ball for the Official Receiver.

Although the application was that the bankrupt might answer certain enquiries, the learned County Court Judge felt the difficulty of the case not so much on account of the form of the questions, as because there would be a medical examination. But the words of the section are very strong. "Section 19 of the Bankruptcy Act, 1869 (*See Section 24 of the Bankruptcy Act, 1883*), provides that 'The bankrupt shall, to the utmost of his power, aid in the realisation of his property, and the distribution of the proceeds amongst his creditors: He shall produce a statement of his affairs to the first meeting of creditors, and shall be publicly examined thereon on a day to be named by the Court, and subject to such adjourned public examination as the Court may direct. He shall give such inventory of his property, such list of his creditors and debtors, and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend such meetings of his creditors, wait at such times on the trustee, execute such powers of attorney, conveyances, deeds, and instruments, and generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors, as may be reasonably required by the trustee, or may be prescribed by rules of Court, or be directed by the Court by any special order or orders made in reference to any particular bankruptcy, or made on the occasion of any special application by the trustee or any creditor'" A bankrupt is bound to aid to the utmost of his power in the realisation of his estate, and he must submit to examination in respect of his property. Is a bankrupt complying with the terms of this section if she refuses to accede to a simple request of this nature?

[CAVE, J. : *Primâ facie*, an examination in respect of health is not an examination in respect of property.]

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This examination is nothing but what a lady might submit to.

[CAVE, J.: The question is whether you can compel her to do so.]

Every enquiry tends to show that the market value of the life interest is nominal unless the bankrupt's life is insured. The General Reversionary and Investment Company have offered 214*l.* for it subject to insurance. There is another offer of 275*l.*, but in every case a life insurance is required as a matter of course. The bankrupt's relations on the other hand have offered 150*l.* for it, but the difference between 150*l.* and 275*l.* is a large amount to go out of the estate. Unless something can be done it seems as if the bankruptcy must be kept open in infinitum. This is the sole asset of the bankrupt, and she cannot be said to be aiding to the utmost of her ability in the realisation of her estate when she refuses to take the course proposed.

R. Vaughan Williams for Mrs. Garnett.

There is the very strong fact that although this section has been so long in force, for it is practically reinserted in the new Bankruptcy Act, there never has been an order to this effect either in the case of a man or of a woman. Then the section itself seems drawn for the very purpose of excluding personal examination or questions touching the health. It provides that a bankrupt shall submit to "examination in respect of his property or his creditors :" and again, that he shall generally do "all acts and things in relation to his property." The section has always been construed strictly. (*Walker v. Mottram*, L. R. 19 Ch. Div. 355). It is a serious matter for people of a timid temperament to undergo an examination. Many would do anything rather than submit to it. There is no precedent for such an order.

CAVE, J.:

Judgment.

I am of opinion that the decision of the County Court Judge was correct, and that this appeal must be dismissed. The section does not in its plain meaning authorise the examination of the bankrupt with regard to his state of health and with a view to insurance. Those matters are of a different nature to the matters

which are referred to in the section. They relate to an examination in respect to property, and do not point to any medical examination of the bankrupt at all. If anything of that kind had been intended it would, in my opinion, have been stated in distinct words. There is, moreover, no authority of an application of this kind having been granted. I do not think I ought to make a precedent. I am satisfied the County Court Judge was right, and the appeal must be dismissed with costs.

1885.
IN RE
GARNETT,
EX PARTE
THE OFFICIAL
RECEIVER.

Appeal dismissed with costs.

Solicitors : *Rice & Burnett*, for the official receiver.

Cuff & Co., for Mrs. Garnett.

Case referred to :—

Walker v. Mottram, L. R. 19 Ch. Div. 355 ; 51 L. J. Ch. 108 ;
45 L. T. 659.

PRACTICE.

IN RE SISSLING, EX PARTE FENTON.

DIVISIONAL
COURT.

Bankruptcy Rules, 1883, Rule 173.

BEFORE
CAVE, J.,
and
DAY, J.
1885.

Proof—Rejection by trustee—Time.

On an appeal by the trustee in a bankruptcy from an order of the County Court allowing a preliminary objection raised against the rejection November 17th. of a proof by such trustee that such rejection was out of time as provided by Rule 173 of the Bankruptcy Rules, 1883.

Held : That the objection must fail : that the question was one merely of procedure : and that the proper course for the registrar of the County Court to have taken was to have treated the application as a motion to expunge the proof on behalf of the trustee.

IN September, 1884, a proof against the estate of the bankrupt Sissling was filed at the office of the official receiver.

1885.
IN RE
SISSELING,
EX PARTE
FENTON.

A trustee in the bankruptcy was subsequently appointed, and, in May, 1885, the proof in question was rejected by such trustee.

From this rejection the creditor appealed to the County Court, and this appeal was allowed on the ground that the rejection was out of time.

The trustee now appealed.

E. Cooper Willis, Q.C., for the trustee.

Muir Mackenzie, for the creditor.

The duties of the official receiver or trustee in relation to the admission or rejection of proofs are stated specifically in rules 171, 172, and 173 of the Bankruptcy Rules, 1883. Rule 173 provides that, "Subject to the power of the Court to extend the time, the trustee, within fourteen days after receiving a proof, shall in writing either admit or reject it wholly or in part, or require further evidence in support of it." This rule is imperative.

[DAY, J.: It is a mere question of procedure.]

In *Ex parte Kemp, In re Russell* (42 L. J. Bank. 26; 28 L. T. 487), when a trustee in a liquidation by arrangement allowed two years to elapse without giving notice of rejection of a creditor's proof, he was taken to have admitted the proof. But as there appeared to be a substantial objection to the proof, the order to which, under such circumstances, the creditor was entitled for payment of a dividend to him, was suspended for a week, to enable the trustee to apply to expunge the proof.

CAVE, J.:

Judgment.

I am of opinion that the objection must fail. There was a neglect of duty on the part of the official receiver. The proof was duly tendered, and it was neither admitted nor rejected. In October a trustee was appointed, and on May 9th the proofs were examined by him for the first time, when it was found that this proof had been neither admitted nor rejected. A notice of rejection was thereupon sent by the trustee to the creditor, from which the creditor appealed. Now the proper course for the registrar to

have taken would have been to point out that the blame rested with the official receiver, who was no longer before the Court, and that the trustee might, under rule 28 of schedule 2 of the Bankruptcy Act, 1883, apply to have the proof expunged at any time. The result would simply have been a subsequent application by the trustee for this purpose. The parties were fighting about nothing, and the registrar might have told them so, and have treated the case as a motion on behalf of the trustee to expunge the proof. I do not think he ought to have sent the parties away on a mere technicality. The objection must be overruled.

1885.
IN RE
SISSLING,
EX PARTE
FENTON.

DAY, J. concurred.

Solicitors: *Pitman & Son.*

H. J. Ram.

Case relied upon:—

Ex parte Kemp, In re Russell, 42 L. J. Bank. 26 ; 28 L. T. 487.

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PRACTICE.

IN RE BELL.

Bankruptcy Act, 1883, sections 117 and 118.

Application for an order of request to the Court at Dublin to enforce an order of the High Court. Costa.

DIVISIONAL
COURT.
BEFORE
CAVE, J.,
and
DAY, J.
1885.

November 18th.

THIS was an application for an order of request to the Bankruptcy Court at Dublin to enforce an order of the High Court.

Section 117 of the Bankruptcy Act, 1883, provides that, "Any order made by a Court having jurisdiction in bankruptcy in England under this Act shall be enforced in Scotland and Ireland in the

1885.
IN RE
BELL.

Courts having jurisdiction in bankruptcy in those parts of the United Kingdom respectively, in the same manner in all respects as if the order had been made by the Court hereby required to enforce it; and in like manner any order made by a Court having jurisdiction in bankruptcy in Scotland shall be enforced in England and Ireland, and any order made by a Court having jurisdiction in bankruptcy in Ireland shall be enforced in England and Scotland by the Courts respectively having jurisdiction in bankruptcy in the part of the United Kingdom where the orders may require to be enforced, and in the same manner in all respects as if the order had been made by the Court required to enforce it in a case of bankruptcy within its own jurisdiction."

And by section 118, "The High Court, the County Courts, the Courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those Courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the Court seeking aid, with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by the order, such jurisdiction as either the Court which made the request, or the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."

The facts of the present case were as follows:—

The debtor *William Bell* was adjudicated bankrupt at Liverpool in April of the present year, and thereupon one *Robert Bell*, of Carlow, in the county of Carlow, Ireland, claimed to be entitled to prove as a creditor against the estate of the said bankrupt in respect of a debt alleged to be due to him of the sum of 3,408*l.* 9*s.* 10*d.*

This proof of *Robert Bell*, however, on examination by *George Mahon*, the trustee of the property of the bankrupt, was rejected, and thereupon the creditor appealed to the County Court of Lancashire, by which Court an order was made on May 30th, 1885, directing that the decision of the trustee should be reversed, and that the proof in question should be admitted for the full amount.

On June 5th, 1885, the trustee gave notice of appeal from this order of the County Court to the Divisional Court sitting in Bankruptcy, and on June 24th the appeal was heard and allowed; and it

was further ordered that the respondent *Robert Bell* should pay to *George Mahon*, the appellant, "his costs of and incident to the application to the said County Court, and of the order of the 30th day of May, 1885, made therein, and of the said appeal," and the costs of the said application were ordered to be taxed by one of the Registrars of the said County Court of Lancashire, and the costs of the appeal by one of the Masters of this Court, and the said costs were ordered to be paid by the said *Robert Bell* to the said trustee, or to Messrs. *Barrell, Rodway & Co.*, his solicitors.

1885.
IN RE
BELL.

It appeared by allocaturs dated respectively August 7th, 1885, and September 22nd, 1885, that the trustee's costs of the appeal had been taxed and allowed at the sum of 28*l.* 2*s.* 2*d.*, and the costs of the application to the County Court at 32*l.* 2*s.* 2*d.*; but although repeated application had been made to the solicitors of *Robert Bell* for payment, the amounts so due had never been paid either to the trustee or his solicitors, and were still owing to the trustee.

F. C. Willis for the trustee, after putting in an affidavit of the above facts, said :—

I simply ask for an order of request to the Court of Dublin to enforce the order of this Court. (*Counsel referred to sections 117 and 118 of the Bankruptcy Act, 1883.*)

CAVE, J. :

You may take it.

F. C. Willis :

I would also ask your Lordship, under the circumstances, to give the costs of this application.

CAVE, J. :

I do not know that we can do that. The trustee must take the costs of this application out of the estate.

Order accordingly.

Solicitors : *Last & Sons*, for *Barrell, Rodway & Co.*, Liverpool,
for the trustee.

DIVISIONAL
COURT.

BEFORE
HAWKINS, J.,
and
CAVE, J.
1886.

December 7th.

IN RE GREEN, EX PARTE EDMUNDS.

Bankruptcy Act, 1883, sections 37, 39, 73, and schedule 2.

Proof—Rejection—Proof expunged—Subsequent compromise of claim—Taxation of costs.

The father of a bankrupt carried in two separate proofs against the estate for 3000*l.*, which were respectively rejected by the trustee to the extent of 2000*l.*, and on the application of another creditor were subsequently expunged in the County Court.

The creditor appealed, but while the appeals were pending, a compromise was entered into according to the terms of which it was agreed that the claim of the creditor should be reduced to the sum of 1380*l.*, and that all costs should be paid by the trustee.

On application to the County Court Judge for an order for taxation in accordance with the terms of this compromise it was refused.

Held (on appeal) : That the proper course was to come to the Court for its consent to the arrangement : and that the refusal of the County Court Judge to grant an order for taxation under the circumstances was right.

THIS was an appeal on behalf of Mr. *Edmunds*, the trustee in the bankruptcy, against an order of the learned Judge of the County Court of Newport and Ryde refusing to order the taxation of certain costs under the following circumstances.

On the bankruptcy of the debtor *Green*, the father of the debtor carried in a proof against the estate for money lent for the sum of 3,000*l.*, which was rejected by the trustee to the extent of 2,000*l.*

The London and County Bank and one *Shepherd* thereupon moved the Court that the whole of the proof be expunged, and this was allowed by the County Court Judge. Against this decision the creditor gave notice of appeal.

While the appeal was pending, however, the creditor carried in a further proof for the 3,000*l.* in another form on a bill of exchange, which was again rejected by the trustee to the extent of 2,000*l.*, and on the application of the London and County Bank and *Shepherd* again expunged by the Court. From this decision a further appeal was lodged.

Before the appeals were heard the trustee and the committee of

inspection, having been strongly advised that the decision of the County Court Judge could not be upheld, entered into negotiations with the creditor, with the effect that a compromise was arranged upon the terms that the claim of the creditor should be reduced to the sum of 1,380*l.*, and that the expenses and costs of the creditor should be taxed by the registrar as between solicitor and client, and the costs of the London and County Bank and Shepherd; and should be paid by the trustee.

1883.
IN RE
GREEN,
EX PARTE
EDMUND'S.

On application to the County Court Judge, however, for an order for taxation in accordance with the terms of this compromise, it was refused, and from this refusal the trustee now appealed.

Yate Lee for the trustee.

I have no opponent here. I simply ask for the order of taxation, in order that the compromise may be carried out. The Board of Trade will not allow the costs unless they are taxed. The Board refers us to section 78 of the Bankruptcy Act, 1883, which deals with the allowance and taxation of costs. The Judge will not order the taxation, and the registrar will not tax without.

[CAVE, J.—The trustee seems to have agreed to pay the costs of all parties, whether successful or unsuccessful.]

The proof might have been upheld for 3,000*l.* The trustee got it reduced to 1,380*l.*, and did practically agree to pay all costs. The committee of inspection and the trustee say it is a most advantageous compromise.

[CAVE, J.—It seems to me that the proper course was to come to the Court and obtain the consent to the compromise. The trustee went behind the County Court Judge's decision, and then went and asked him to help him. I do not wonder that he will not do so. Why the London and County Bank, who, on your shewing to-day, have been in the wrong all through, should have their costs paid, I fail to see.]

[HAWKINS, J.—Everybody seems to be getting his costs all round.

1885.

IN RE
GREEN,
EX PARTE
EDMUND'S.

On your shewing, the estate is to pay the costs of a vexatious opposition to proof.]

I admit that the proof of *Green* was certain to succeed. It was on a bill of exchange which could not be disputed.

[*Hawkins*, J.—The more you make out that the London and County Bank was wrong, and *Green* the creditor was right, the more, to my mind, you do harm to your case.]

The 8,000*l.* would certainly have been allowed by the Court of Appeal.

[*Cave*, J.—That makes it all the more inexplicable why the London and County Bank should get their costs. If *Green*, the creditor, is entitled to the 8,000*l.*, why should he not be allowed to prove for it ?]

It is a common thing in a bankruptcy for the relations and friends to stand on one side, and so allow a larger dividend to be paid.

• *Hawkins*, J.:

Judgment. I certainly think that we ought not to grant this application. I do not wonder that the County Court Judge refused to sanction the taxation. He had had the whole matter before him. There was an appeal but it was not prosecuted. The County Court Judge said in effect, "I have given judgment: you now seek to reverse the judgment and pay to a person costs which I think wrong." I am of opinion that in refusing the County Court Judge was right.

Cave, J.:

I am of the same opinion. The London and County Bank and *Shepherd* took upon themselves to oppose this proof, and so far as the County Court Judge was concerned, successfully. An appeal was lodged but not prosecuted. *Green* the creditor had so far failed all along the line. Now the Committee of Inspec-

tion and the trustee bring about this extraordinary compromise. They were advised that the creditor had undoubted right to prove, yet they arrange a compromise by which he is willing to reduce his claim to 1880*l.* For what reason? That the trustee and Committee of Inspection will go the length of paying his adversaries their costs. I cannot think that this is a *bona fide* compromise. I should require the strictest evidence in such a case. Somebody must have been deceived. Either *Green* the creditor must have not realised his unassailable position or his position could not have been so unassailable. The proper course was to come to this Court and state the compromise and ask consent to it. That was not done, neither was any application made to the County Court Judge. But this arrangement was made without consent, and then the County Court Judge was asked for an order for taxation of costs of this kind. I should have been much surprised if the County Court Judge had granted it. The application will be dismissed and the trustee must pay the costs personally.

Yate Lee: My Lord, the trustee is the servant of the Committee of Inspection and has acted under its commands.

CAVE, J.: Then the Committee of Inspection will doubtless oblige him by paying his costs.

Yate Lee: He has no power to compel them.

CAVE, J.: Then he must take the consequences.

Yate Lee: Will your Lordships give leave to appeal?

HAWKINS, J.: No.

Appeal dismissed with costs.

Solicitors: *Crowder & Vizard*, for the trustee.

1885.
—
IN RE
GREEN,
EX PARTE
EDMONDS,

PRACTICE.

BEFORE
MR. JUSTICE
CAVE.
1885.

December 11th.

IN RE GREPE, EX PARTE GREPE.

Application for annulment of adjudication—Previous applications in same matter—Non-payment of costs.

Held: That although it is no good reason for dismissing an application made in one matter that costs ordered to be paid in a previous application in another matter substantially different, have not been paid; yet the Court will not be bound to hear a subsequent application made to it unless the costs of a previous application in the same matter which have been ordered to be paid by the applicant, have been settled.

THIS was an appeal from a decision of the learned Judge of the County Court at East Stonehouse refusing an application by the debtor *John Grepe* for the annulment of his adjudication in bankruptcy.

The order of the County Court Judge appealed from was in the following terms:—

“ Upon the hearing of an application by the above-named *John Grepe* that the order of adjudication of bankruptcy against him might be annulled and for other orders to be made in accordance with a notice of motion dated the 9th day of October, 1885, filed in the Court on the 15th day of October, 1885, and another notice of motion dated the 15th day of October, 1885, and upon hearing *John Grepe* who appeared personally and . . . counsel for *Henry Saunders* the trustee in this matter . . . and upon reading the notices of motion and the affidavit of the said *John Grepe*, and the file of the proceedings in this matter: and it appearing that the said *John Grepe* had made eleven applications, including appeals, all of which were determined or refused, nine of them with costs to be paid by the said *John Grepe*, who has not paid any of the costs ordered to be paid by him on former motions and applications. It is ordered that the application be and the same is hereby dismissed; and that the costs of the applicant be borne and paid by himself; and that the costs of the trustee and of the petitioning creditor, of and incidental to the said application and this order (including the fees of counsel from London on behalf of the

trustee) be taxed by the registrar of this Court and allowed and paid by the trustee out of the estate in this matter."

John Grepe, the debtor, appeared, in support of the appeal, in person.

Stroud for the trustee:

There were eleven previous applications, including appeals, which had been refused. The bankrupt had not paid the costs of those.

[CAVE, J.: Have you any authority that if an applicant does not pay the costs of one application he shall not be allowed to go on with another ?]

I can find no authority, but I submit that the rule is the same as in the Queen's Bench Division. It is inherent in the Court to make a man *rectus in curia*. The Court below was vexed with application after application in this matter. It is an abuse of the process of the Court. Rule 4 of Order 26 of the Judicature Rules provides that "If any subsequent action shall be brought before payment of the costs of a discontinued action, for the same, or substantially the same, cause of action, the Court or a Judge may, if they or he think fit, order a stay of such subsequent action, until such costs shall have been paid." It has always been the practice of the Court to stay the prosecution of a second action until the costs of the first have been paid. Here there were eleven. The motions already decided deal with all the questions on the notice of motion to-day.

[CAVE, J.: I must hear the debtor's affidavit which the County Court Judge says he read.]

John Grepe, the bankrupt, read a long affidavit setting forth at great length his grounds of appeal and the reasons alleged by him for the annulment of the bankruptcy; and the cases on the file which had been previously dismissed were specifically examined.

1885.
IN RE
GREPE,
EX PARTE
GREPE.

1885.
IN RE
GREPE,
EX PARTE
GREPE.
Judgment.

CAVE, J.:

This was an appeal against an order of the County Court Judge dismissing an application by *Grepe*, the bankrupt, on the ground that he had made previous applications which were dismissed with costs, and those costs had not been paid. Now it was quite impossible to say whether that reason was sufficient for such dismissal without looking to see what the present application is and what the former applications were. In my judgment the fact that a man has failed to pay the costs of an application in one matter is no reason for dismissing an application in a different matter. If the applications are in the same matter it appears only right that a further one should be refused to be heard until the costs of a former application have been paid. But when the applications are substantially different this rule does not apply. Here I am clearly of opinion that the application was dismissed on good grounds. . . .

Appeal dismissed with costs.

Solicitors : *Henry Kimber, Elliott & Co.*, for the trustee.



DIGEST OF CASES REPORTED IN THIS VOLUME.

ACT OF BANKRUPTCY.]—(1) A debtor, on August 28th, 1884, on being pressed by a creditor, who had obtained judgment, for payment of the debt due to him, gave to an auctioneer, who was about to sell the farming stock of such debtor, a document by which he authorized and requested him to pay to such creditor, after deducting any rent which might be due to the landlord, the debt due to him out of the first proceeds of the sale, and appropriated the sum necessary to pay the debt out of the proceeds of the sale for the purposes of the payment.

On October 22nd, 1884, a receiving order was made against the debtor, and the sum so appropriated was subsequently claimed by the official receiver as trustee in the bankruptcy on the grounds (1) That the document was an assignment of the whole of the debtor's property, and as such amounted to an act of bankruptcy ; (2) That it was a fraudulent preference.

Held : That under the circumstances of the case the document in question did not amount to an assignment of the whole of the debtor's property.

That the principal motive of the debtor was not to favour the creditor, and that the transaction did not constitute a fraudulent preference.

That the official receiver as trustee having come to the Court was in the same position as an ordinary litigant, and being unsuccessful must pay the costs. *In re Glanville, Ex parte the Trustee* p. 71

(2) *Held* : That the fact that a debtor called a meeting of his creditors at which he laid before them his position, and made an offer of 6s. 8d. in the pound, did not amount to a notice by such debtor "that he has suspended, or that he is about to suspend payment of his debts," so as to constitute an act of bankruptcy under section 4, sub-section 1 (h) of the Bankruptcy Act, 1883. *In re Walsh, Ex parte the Trustee* p. 112

(3) Where two circulars were sent out by the solicitors of the debtor to the creditors, calling a meeting of the creditors, and laying before them the position of the debtor, and further stating that by the kindness of friends, and by raising money upon his furniture, such debtor might be enabled to pay 10s. in the pound, provided all the creditors would accept it to save bankruptcy proceedings, but that if all the creditors would not agree, there was no alternative but to seek the protection of the Court.

Held : That such statements amounted to a notice by the debtor "that he has suspended or that he is about to suspend payment of his debts," so as to constitute an act of bankruptcy under section 4, sub-section 1 (h) of the Bankruptcy Act, 1883. *In re Wolstenholme, Ex parte Wolstenholme* p. 213

ADMINISTRATION OF ESTATE OF DECEASED INSOLVENT.]—Where an order of commitment was made against the widow and son of a deceased debtor

whose estate was being administered in bankruptcy under the provisions of section 125 of the Bankruptcy Act, 1883, on the ground that they had refused to comply with an order of the County Court directing them to attend for the purpose of being examined with regard to the estate of such deceased debtor under section 27 of the Act.

Held: That section 27 of the Bankruptcy Act, 1883, does not apply to section 125 of the Act: that the powers under Order XXXVII., Rule 5 of the Supreme Court Rules, 1883, as to the examination of witnesses only exist where some litigation is in progress: and that Rule 58 of the Bankruptcy Rules, 1883, does not give any such power as was sought for in the present case. *In re Hewitt, Ex parte Hewitt* p. 184

ALIMONY.]—*Held*: That where an order is made by the Divorce Court for the future payment of alimony by a husband under the statute 29 & 30 Vict. c. 32, s. 1, such payments are not capable of valuation, and cannot therefore be proved for in the event of the husband being adjudicated bankrupt, but such husband is liable to continue the payments notwithstanding the bankruptcy. *In re Linton, Ex parte Linton* p. 179

AMENDMENT OF PROOF.]—See *In re Arden, Ex parte Arden* p. 1
In re King, Ex parte Mesham p. 119

APPEAL—*Notice of sent by post*.]—*Quare*. Whether, where notice of appeal is sent by post in accordance with the provisions of section 142 of the Bankruptcy Act, 1883, such notice will be in time, unless the letter is received by the respondent before the expiration of the twenty-one days during which the appeal may be brought. *In re Arden, Ex parte Arden* p. 1

From Refusal to Order Prosecution of Bankrupt.]—*Appeal* from refusal to order prosecution of a bankrupt. Fraudulent removal of furniture. The Debtors Act, 1869 (32 & 33 Vict. c. 62), sections 11, 12, and 16. *In re Stephens, Ex parte the Trustee* p. 20

Leave not obtained in Small Bankruptcy.]—(1) Upon an appeal from a County Court in the case of a small bankruptcy under section 121 of the Bankruptcy Act, 1883, it was argued, against the preliminary objection taken that the necessary leave to appeal had not been obtained, that Rule 199, sub-section 5, of the Bankruptcy Rules, 1883, by which such leave is made requisite, was *ultra vires*.

Held: That the right of appeal given by the Act was a statutory right; that the same statute which gave the right could delegate to a prescribed authority the power to modify the right in the prescribed manner; and that the necessary leave not having been obtained, the appeal could not be heard. *In re Dale, Ex parte Dale* p. 92

(2) Small Bankruptcy—Preliminary objection—Leave to appeal not obtained when notice of appeal given and served—Leave obtained afterwards. *In re Stockton and Sabistan, Ex parte Gibson* p. 189

Deposit on.]—Where application was made by a debtor who had presented a

bankruptcy petition against himself to dispense with the deposit of 20*l.* required to be lodged upon an appeal against a decision of the registrar rescinding the receiving order at the request of the official receiver under section 14 of Bankruptcy Act, 1883.

Held: That the debtor's alleged inability to raise the necessary sum did not on the facts of the case constitute such a special circumstance under Rule 113 of the Bankruptcy Rules, 1883, as to justify the Court in granting the application. *In re Robertson* p. 117

Out of Time.]—(1) Held: That as a matter of courtesy, the solicitor of a respondent, if he is aware of a preliminary objection to an appeal, ought as early as possible to give notice to his opponent of such preliminary objection.

If, however, the notice is not given, and the appeal is dismissed on the preliminary objection, such omission to give notice is no reason for depriving the respondent of the costs of the appeal. *In re Mundy, Ex parte Stead* . . . p. 227

(2) On an appeal from the refusal by the registrar of an application of the debtor for leave to summon a fresh first meeting of his creditors, the objection was taken that the appeal was out of time.

The appellant's solicitor deposed that he had mistaken the effect of the rules, and was of opinion that the time for appealing ran from the date of the perfecting of the order, instead of the date when it was pronounced.

Held: That the order appealed from was in the nature of an interlocutory order, and as no harm could be done to any one, the time would now be extended. *In re Tippett, Ex parte Tippett* p. 229

“APPURTENANCES.”]—In a case where certain fishing boats had been mortgaged by the bankrupts, and the mortgagees laid claim to the nets and fishing gear which had been used on board the said vessels (but of which no particular nets were appropriated to or specially belonging to any particular vessel) on the ground that such nets and fishing gear came within the word “ship” in section 72, and the word “appurtenances” in the form of mortgage of a ship now in use and substituted for Form I. given in the Merchant Shipping Act, 1854.

Held: That in order to make a thing an appurtenance it must be specified: that in the present case there was no evidence to show that any specific nets were appropriated to any particular ship, but that they were used indiscriminately: and that they could not in consequence be considered “appurtenances” within the meaning of the Act. *In re Salmon and Woods, Ex parte Gould* . . . p. 137

ARRANGEMENT.]—See Scheme of Arrangement.

ARREST.]—On February 12th, 1885, a receiving order was made against the debtor, and on February 23rd, the summary administration of his estate was ordered under section 121 of the Bankruptcy Act, 1883.

On February 25th, while on his way to the office of the official receiver for the purpose of handing to that officer certain moneys which he had been ordered to pay over, the debtor was served by the serjeant-at-mace of the Mayor's Court with

an order of commitment for having failed to pay an instalment of 2*l*. 8*s*. 6*d*. due under a judgment previously obtained in that Court.

This sum, in order to avoid arrest, the debtor paid under protest. On application made by the official receiver that it should be paid over to him.

Held : That under section 9 of the Bankruptcy Act, 1883, the creditor lost the right to enforce the payment by arrest, and that the official receiver was entitled to the money. *In re Ryley, Ex parte the Official Receiver* p. 171

BANKRUPTCY NOTICE.]—(1) A debtor, after the service of a bankruptcy notice upon him under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, commenced an action against his creditor to set aside the judgment on which such notice was founded, and prayed that an account might be taken, and made other claims in the nature of a counterclaim. The debtor delivered the statement of claim in the action, and applied to the Court to dismiss the bankruptcy notice. The registrar, after reading the statement of claim, adjourned the application *sine die*, with liberty to apply.

Held (on appeal) : That the statement of claim was not evidence ; and the registrar, before interfering with the operation of the bankruptcy notice, ought to have been satisfied by evidence that the debtor had at any rate some reasonable ground for bringing the action. *In re Foster, Ex parte Basan* p. 29

(2) Where, in consequence of a breach of covenant of articles of partnership, an action was brought in the Chancery Division and judgment obtained, restraining the defendant from carrying on business within a certain radius—dissolving the partnership—ordering an enquiry as to the amount of damage sustained by the plaintiff—and further ordering the costs of the defendant to be paid—and pending the enquiry as to the damages, the costs were taxed, and only a portion being paid, a bankruptcy notice was served on the debtor under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, for the remainder.

Held : That the sum in respect of which the bankruptcy notice was served was due under a final judgment within the meaning of the section, the amount in question being wholly independent of the result of the enquiry.

That the words “a creditor” in section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, mean a creditor under or by means of a final judgment. *In re Faithfull, Ex parte Moore* p. 52

(3) Where a debtor against whom no proceedings in bankruptcy had been taken entered into an arrangement with his creditors by which he agreed to pay 10*s*. in the pound within six years to any creditors signing the deed of arrangement, and the creditors covenanted by the said deed not to sue the debtor, or to enforce any judgment already obtained, and to forego all their claims on him if the provisions of the deed were carried out : which deed was signed by a creditor who had previously obtained a final judgment against the debtor : and after such creditor had signed three other creditors signed the deed, who it was subsequently discovered, had received from the debtor's brother, with the knowledge of the debtor, certain other payments over and above the 10*s*. in the pound secured by the deed.

Held : That the principle laid down in the case of *Daughish v. Tennent* (L. R. 2

- Q. B. 49) applies to all composition deeds whether under a statute or not : that it is an implied condition in all such deeds that all the creditors shall come into the arrangement on perfectly equal terms : and that the order of the registrar refusing to set aside a bankruptcy notice served upon the debtor by the creditor who had obtained a final judgment was a right order, such creditor being no longer bound by the deed. *In re Milner, Ex parte Milner* p. 190
 (4) See *In re Isaac, Ex parte Isaac* p. 258
 (5) *In re Lennox, Ex parte Lennox* p. 271

BILLS OF EXCHANGE ACT.]—See *Re-exchange; Proof. In re Gillespie, Ex parte Roberts* p. 278

- BOARD OF TRADE.]—(1) *Application* on behalf of the Board of Trade for an order requiring a trustee under a liquidation to submit an account verified by affidavit of the sums received by him. Previous release and discharge of such trustee. Right of the Board of Trade to demand an account. *In re Chudley, Ex parte the Board of Trade* p. 8
 (2) Powers of Official Receiver—Compromise—Sanction of the Board of Trade—Certificate under section 140, sub-section (2), of the Bankruptcy Act, 1883—Costs. *In re Johnstone, Ex parte Singleton* p. 206

“CHOSES IN ACTION.”]—Where a partner in a stockbroking firm purchased shares in a railway company with money of the firm, and subsequently deposited the share certificates with the firm’s bankers as security or cover for advance made by them to the firm, and before notice of the deposit had been given to the railway company, the firm, and also the members of it, were adjudicated bankrupts.

Held: That the trustee in the bankruptcy was entitled to such shares as goods in “the possession, order, or disposition of the bankrupt in his trade or business,” within section 44, sub-section (iii.), of the Bankruptcy Act, 1883.

That the words “in his trade or business” in the said section, mean “for the purposes of and as connected with his trade or business.”

(FRY, L.J., dissentiente.) That such shares were not choses in action within the meaning of the Act, so as to be excepted from the doctrine of reputed ownership. *Colonial Bank v. Whinney* p. 234

COMMITTAL.]—(1) *Application* for the committal of a debtor for contempt in refusing to deliver up possession of premises occupied by him, at the request of the trustee in bankruptcy. Form of Order. *In re Cox, Ex parte the Trustee* p. 23

(2) Judgment summons—Order for Payment by Instalments—“Means to Pay”—The Debtors Act, 1869, section 5, sub-section (2)—Refusal to commit. *In re Park, Ex parte Koster* p. 35

(3) *Held:* That where the Judge of a County Court, not having jurisdiction in bankruptcy, at the hearing of a judgment summons for a committal, is of opinion that a receiving order should be made in lieu of a committal, and orders the matter

to be transferred to the Bankruptcy Court under rule 268 (1) (a) of the Bankruptcy Rules, 1885, notice of the subsequent proceedings under the order of transfer must be served on the judgment debtor.

That the Court of Bankruptcy in such a case is not bound to adopt the opinion of the County Court Judge, and to make a receiving order as a matter of course, but must exercise its own judicial discretion at the hearing. *In re Andrews, Ex parte Andrews* p. 244

COMPOSITION.]—See Scheme of Arrangement.

Refusal of Court to approve].—(1) In a case where a debtor, as the managing director of a mining company, the mines being undeveloped, advanced both his own and borrowed money to the company, which subsequently become insolvent, and a petition in bankruptcy was presented against the debtor, and a composition accepted by his creditors.

Held: That the debtor had been guilty of rash and hazardous speculations; and that the registrar was quite right in refusing to approve the composition offered. *In re Young, Ex parte Young* p. 37

(2) On a contention raised that although for the purposes of the discharge of a bankrupt under section 28 of the Bankruptcy Act, 1883, the report of the official receiver is *prima facie* evidence of the truth of the statements therein contained, nevertheless for the purposes of the approval of a composition or scheme under section 18, sub-section (6) of the Act, such report is not made *prima facie* evidence, and that the registrar ought not to refuse to approve a composition without having the facts mentioned in section 28, sub-section (3), proved by other evidence.

Held: That the report of the official receiver is *prima facie* evidence for the purposes of section 18, sub-section (6), and that the proof of the facts referred to in section 28, sub-section (3), which is sufficient in the case of the discharge of a bankrupt under that section, would also be sufficient proof in the case of the approval of the composition or scheme under section 18, sub-section (6).

*Per BRETT, M.R.—*That in deciding as to the granting or refusing the discharge of a bankrupt or the approval of a composition or scheme of arrangement, the question whether the debtor has kept proper books is one of primary importance.

That it is no ground to set aside the decision of the registrar refusing to approve a composition because a large majority of the creditors of a debtor are desirous of accepting it, but that the object of the Bankruptcy Act, 1883, being to prevent reckless debtors from escaping the consequences of their conduct by the payment of a nominal dividend, it is the duty of the Court to protect such creditors from themselves. *In re Wallace, Ex parte Campbell* p. 167

(3) Where a debtor against whom no proceedings in bankruptcy had been taken entered into an arrangement with his creditors by which he agreed to pay 10s. in the pound within six years to any creditors signing the deed of arrangement and the creditors covenanted by the said deed not to sue the debtor, or to enforce any judgment already obtained, and to forego all their claims on him if the provisions of the deed were carried out: which deed was signed by a creditor who had previously obtained a final judgment against the debtor: and after such creditor had

signed three other creditors signed the deed, who it was subsequently discovered had received from the debtor's brother, with the knowledge of the debtor, certain other payments over and above the 10s. in the pound secured by the deed.

Held: That the principle laid down in the case of *Dauglish v. Tennant* (L. R. 2 Q. B. 49) applies to all composition deeds whether under a statute or not : that it is an implied condition in all such deeds that all the creditors shall come into the arrangement on perfectly equal terms : and that the order of the registrar refusing to set aside a bankruptcy notice served upon the debtor by the creditor who had obtained a final judgment was a right order, such creditor being no longer bound by the deed. *In re Milner, Ex parte Milner* p. 190

COMPROMISE.—*By Official Receiver.*]—Powers of Official Receiver—Compromise—Sanction of the Board of Trade—Certificate under section 140, sub-section (2) of the Bankruptcy Act, 1883—Costs. *In re Johnstone, Ex parte Singleton* . p. 206

By Trustee.]—See *In re Green, Ex parte Edmunds* p. 294

COSTS.—*Of Trustee.*]—See *In re Arden, Ex parte Arden* p. 1

(2) *In re King, Ex parte Mesham* p. 119

(3) *In re Bell* p. 291

(4) *In re Green, Ex parte Edmunds* p. 294

As between solicitor and client.]—The Court by three orders gave costs as “between party and party.”

Subsequently an application was made that such costs might be “as between solicitor and client ;” which application was refused.

Held (on appeal) :—That the application ought to have been made to the Court at the time when the costs were awarded ; and that the words of rule 98 of the Bankruptcy Rules, 1883—“the Court in awarding costs”—mean at the time when the Court makes the order. *In re Angell, Ex parte Shoolbred* p. 5

Of Official Receiver.]—See (1) *In re White, Winter & Co., Ex parte White, Winter & Co.* p. 42

(2) *In re Johnstone, Ex parte Singleton* p. 206

Of Official Receiver as Trustee.]—See *In re Glanville, Ex parte the Trustee* . p. 71

Of Official Receiver acting as Solicitor.]—*Held:* That the effect of section 116, sub-section (2) of the Bankruptcy Act, 1883, which provides that no official receiver “shall, during his continuance in office, either directly or indirectly, by himself, his clerk, or partner, act as solicitor in any proceeding in bankruptcy,” is not limited to cases of the official receiver acting as solicitor by himself, his clerk or partner, for another person, or on an application for the benefit of the estate, but extends also to cases where the official receiver is acting as solicitor for himself and conducting a case on his own behalf. *In re Taylor, Ex parte the Official Receiver* p. 127

Agreement for.]—Where an agreement entered into by a solicitor to conduct certain bankruptcy proceedings on the terms that his costs should not exceed 10l.

had been declared void by the County Court Judge on the application of such solicitor, and an appeal from this decision having been brought to the Divisional Court in Bankruptcy, the preliminary objection was taken that the Court, sitting as a Court of Appeal in bankruptcy matters only, had no jurisdiction to deal with the question at all.

Held: That the Court had jurisdiction to hear the appeal.

That the fact that the agreement did not contain a provision that the solicitor so employed might continue the bankruptcy proceedings to the end, did not make such agreement unfair or unreasonable, and that the order of the County Court Judge setting aside such agreement must be reversed. *In re Owen, Ex parte Peyton* p. 87

When Appeal out of Time.]—Held: That as a matter of courtesy, the solicitor of a respondent, if he is aware of a preliminary objection to an appeal, ought as early as possible to give notice to his opponent of such preliminary objection.

If, however, the notice is not given, and the appeal is dismissed on the preliminary objection, such omission to give notice is no reason for depriving the respondent of the costs of the appeal. *In re Mundy, Ex parte Stead* . . . p. 227

Compare and quare *In re Speight, Ex parte Brooke* (L. R. 13 Q. B. D. 42), and *In re Blenkhorn, Ex parte Bleasdale and Bleasdale* (see *ante*, Volume I., page 280).

Of Taxation.]—Held: That where in an ordinary taxation of the costs of the solicitor to the trustee in the bankruptcy, the amount of the solicitor's bill is reduced by more than one-sixth, there is no rule in the Court of Bankruptcy that such solicitor shall pay the costs of the taxation.

That the provisions of the Attorneys and Solicitors Act (6 & 7 Vict. c. 73), do not apply in an ordinary reference to tax such costs, but the taxation is regulated by the practice of the Court of Bankruptcy. *In re Marsh, Ex parte Marsh*. p. 232

Of Unsuccessful Applicant.]—See In re Ridgway, Ex parte Ridgway. . . p. 248

*Order for Taxation of.]—The father of a bankrupt carried in two separate proofs against the estate for 3,000*l.*, which were respectively rejected by the trustee to the extent of 2,000*l.*, and on the application of another creditor were subsequently expunged in the County Court.*

The creditor appealed, but while the appeals were pending, a compromise was entered into according to the terms of which it was agreed that the claim of the creditor should be reduced to the sum of 1,380*l.*, and that all costs should be paid by the trustee.

On application to the County Court Judge for an order for taxation in accordance with the terms of this compromise, it was refused.

Held (on appeal): That the proper course was to come to the Court for its consent to the arrangement: and that the refusal of the County Court Judge to grant an order for taxation under the circumstances was right. *In re Green, Ex parte Edmunds* p. 234

Of former Applications Unpaid.]—Held: That although it is no good reason for dismissing an application made in one matter, that costs ordered to be paid in a previous application in another matter substantially different have not been paid; yet the Court will not be bound to hear a subsequent application made to it unless the costs of a previous application in the same matter, which have been

ordered to be paid by the applicant, have been settled. *In re Grepe, Ex parte Grepe* p. 298

COUNTERCLAIM. See SET-OFF (2).

COUNTY COURT—*Jurisdiction of.*]—*Held*: That by the provisions of sections 100 and 102 of the Bankruptcy Act, 1883, which gave to a County Court “for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the Court all the powers and jurisdiction of the High Court,” and also “full power to decide all questions of priorities, and all questions whatsoever whether of law or fact which may arise in any case of bankruptcy,” a County Court has no jurisdiction or power to restrain an action in the High Court brought against the trustee of a debtor adjudicated bankrupt in such County Court. *In re Barnett, Ex parte Reynolds & Co.* p. 147

Transfer from.]—*Held*: That where the Judge of a County Court not having jurisdiction in bankruptcy, at the hearing of a judgment summons for a committal, is of opinion that a receiving order should be made in lieu of a committal, and orders the matter to be transferred to the Bankruptcy Court under rule 268 (1) (a) of the Bankruptcy Rules, 1885, notice of the subsequent proceedings under the order of transfer must be served on the judgment debtor.

That the Court of Bankruptcy in such a case is not bound to adopt the opinion of the County Court Judge, and to make a receiving order as a matter of course, but must exercise its own judicial discretion at the hearing. *In re Andrews, Ex parte Andrews* p. 244

CREDITOR—*Amendment of Proof of Secured.*]—*Held*: That where a mortgagee who has valued his security is desirous of amending his valuation and proof under rule 13 of schedule 2 of the Bankruptcy Act, 1883, leave to amend may be given in a proper case, although such amendment is opposed by a subsequent mortgagee. *In re Arden, Ex parte Arden* p. 1

Meaning of Term.]—*Held*: That the words “a creditor” in section 4, subsection 1 (g), of the Bankruptcy Act, 1883, mean a creditor under or by means of a final judgment. *In re Faithfull, Ex parte Moore* p. 52

Preferred.]—See *In re Milner, Ex parte Milner* p. 190

CUSTOM.]—See *In re Taylor, Ex parte Dyer* p. 268

DEBTORS ACT, 1869.]—See (1) *In re Stephens, Ex parte the Trustee* p. 20
 (2) *In re Park, Ex parte Koster* p. 35

DELEGATION OF JUDGE'S AUTHORITY]—*Appeal* from an order of the Registrar the effect of which was to set aside as against the trustee in a bankruptcy under the Bankruptcy Act, 1869, a post-nuptial settlement executed by the bankrupt.

Objection. That under the provisions of the Bankruptcy Act, 1883, the Registrar had no jurisdiction to make the order.

Held: That the jurisdiction which the Registrars in bankruptcy had by delegation or otherwise, under the Bankruptcy Act, 1869, is preserved to them in respect of pending proceedings by section 169, sub-section (3), of the Bankruptcy Act, 1883.

That rule 264 of the Bankruptcy Rules, 1883, which provides for the exercise of their jurisdiction is not *ultra vires*, and is properly framed for the purpose of carrying out the intention of the Legislature with regard to pending proceedings. *In re Home, Ex parte Edwards* p. 203

DEPOSIT ON APPEAL.]—Where application was made by a debtor who had presented a bankruptcy petition against himself to dispense with the deposit of 20*l.* required to be lodged upon an appeal against a decision of the Registrar rescinding the receiving order at the request of the official receiver under section 14 of Bankruptcy Act, 1883.

Held: That the debtor's alleged inability to raise the necessary sum did not on the facts of the case constitute such a special circumstance under rule 113 of the Bankruptcy Rules, 1883, as to justify the Court in granting the application. *In re Robertson* p. 117

DISCHARGE.]—(1) The debtors commenced business by means of borrowed money, and assigned as security to the lender their leasehold premises, goodwill, and all existing and after-acquired stock-in-trade. The mortgagee subsequently took possession under this deed, and the debtors became bankrupt, nothing being left for the general creditors.

Held: That the debtors had contracted debts without having any reasonable or probable ground of expectation of being able to pay them; and that the order of the registrar granting a discharge only upon the terms of judgment being entered up against the bankrupt for the full amount of the debts provable in the bankruptcy, was a right order. *In re White, Winter & Co., Ex parte White, Winter & Co.* p. 42

(2) On the application of the bankrupt for his discharge the official receiver reported that the bankrupt had previously filed a petition for liquidation of his affairs, under which his discharge had not been granted.

Held: That the practice of the Court is, that when an undischarged bankrupt makes an application for his discharge under a second bankruptcy, the Court will not entertain the application until he has purged himself of his former bankruptcy; and it appearing that the bankrupt had not obtained his discharge under the liquidation petition referred to in the report of the official receiver, the application would be adjourned *sine die* with liberty to apply. *In re Binko* p. 45

(3) *Application for discharge.* Contracting debts without reasonable expectation of payment. Fraud. *In re Du Boulay* p. 49

(4) Where, on an application for discharge of a bankrupt, an objection was taken on behalf of the bankrupt to the report of the official receiver being received

in evidence, on the ground that, although such report bore the signature of that official, it was not prepared by him.

Held: That such report is *prima facie* evidence of the statements contained therein, as provided by section 28, sub-section (4) of the Bankruptcy Act, 1883, and that the Court will not go behind the report or enter into any enquiry as to by whom it was prepared. *In re Bull* p. 59

(5) *Held*: That the quasi-penal provisions of section 28 of the Bankruptcy Act, 1883, with regard to the granting of a bankrupt's discharge, apply to the conduct of the bankrupt previous to the time when the Act came into operation.

Where the bankrupt who was a solicitor without capital entered into heavy building operations on borrowed money, to which speculations his insolvency was attributable.

Held: That the bankrupt had been guilty of rash and hazardous speculations, and that the order of the registrar refusing an absolute discharge was a right order. *In re Salaman, Ex parte Salaman* p. 61

(6) A debtor at the time when the action was commenced in which final judgment was obtained against him, upon which the receiving order was subsequently made, carried on business in partnership with his father, and had a considerable income. During the pendency of the proceedings in the action, the debtor paid away the money belonging to him in the business, and also received notice from his father to quit the partnership.

The County Court judge granted the bankrupt his discharge on the terms that he should pay to the trustee in the bankruptcy the sum of £700 out of his earnings or income or any after acquired property.

Held (on appeal): That the order of the County Court judge must be modified, and that there would be an order granting to the bankrupt his discharge on consenting to judgment being entered against him in the terms of section 28, subsection (6), of the Bankruptcy Act, 1883. *In re Clarkson* p. 219

(7) That in deciding as to the granting or refusing the discharge of a bankrupt or the approval of a composition or scheme of arrangement the question whether the debtor has kept proper books is one of primary importance. *In re Wallace, Ex parte Campbell* p. 167

DISCLAIMER.]—(1) *Held*: That the word "property" as used in section 55, and as defined in section 168 of the Bankruptcy Act, 1883, is not restricted to "property divisible amongst the creditors" mentioned in section 44, but extends to any kind of property subject to any onerous covenants or obligations which may be vested in the debtor. *In re Maughan* p. 25

(2) *Held*: That where in accordance with the provisions of section 121 of the Bankruptcy Act, 1883, relating to small bankruptcies, an order is made for the summary administration of a bankrupt's estate, and the official receiver, as trustee in the bankruptcy, disclaims leasehold property of the bankrupt without the leave of the Court under the powers conferred on him by Rule 232 of the Bankruptcy Rules, 1883, the Court has no jurisdiction to give any compensation to the landlord out of the estate for the use and occupation of such leasehold property

by the official receiver as such trustee. *In re Sandwell, Ex parte Zerfass* . . p. 95
 DISCOVERY.]—See *In re Garnett, Ex parte the Official Receiver* . . . p. 286

DIVORCE COURT.]—See *Alimony*.

EVIDENCE.]—See (1) *In re Foster, Ex parte Basan* p. 29
 (2) *In re Wallace, Ex parte Campbell* p. 167

EXAMINATION.]—See (1) *Public Examination*. (2) *Personal Examination*.

EXECUTION.]—(1) The sheriff was in possession of the goods under several writs of *fi. fa.*—the three first of which according to date were for more than 20*l.*, and the fifth for 12*l.* 13*s.*

The sale was held, and the sheriff, having received notice within fourteen days of a bankruptcy petition against the debtor, paid in the proceeds of the sale to the official receiver as trustee in the bankruptcy.

The amount of the three prior writs exceeded together the amount realized by the sale.

On a claim by the execution creditor under the subsequent writ for 12*l.* 13*s.*—that he was entitled to be paid the amount of his debt in full :

Held : That it was not the effect of section 46 of the Bankruptcy Act, 1883, to make executions for more than 20*l.* altogether void, but to deprive the execution creditor of the benefit of the execution : that if no bankruptcy had occurred the writs would have been paid in order of date : and that under the Act the sheriff was required to pay over to the trustee in the bankruptcy the amount which would have been appropriated to the first writs. *In re Pearce, Ex parte Crossthwaite* p. 105

(2) *Held* : That the notice to the sheriff mentioned in section 46, sub-section (2) of the Bankruptcy Act, 1883, must be given either to the sheriff himself, or to some recognised agent of his for the purpose of receiving such notice, such as the under-sheriff or some authorised person at the sheriff's office, and that such notice given to an ordinary bailiff or man in possession is not sufficient.

That the term “officer charged with the execution of a writ or other process” included in the term “sheriff” by section 168 of the Bankruptcy Act, 1883, signifies an officer charged with duties similar to those of a sheriff though he is not called sheriff, as for example, the bailiff of a County Court.

In an action in the Mayor's Court the notice should be given at the office of the Serjeant-at-Mace, either to him or to his representative. *In re Holland, Ex parte Warren* p. 142

FI. FA.]—See Execution.

FINAL JUDGMENT.]—(1) Where, in consequence of a breach of covenant of articles of partnership, an action was brought in the Chancery Division and judg-

ment obtained, restraining the defendant from carrying on business within a certain radius—dissolving the partnership—ordering an enquiry as to the amount of damage sustained by the plaintiff—and further ordering the costs of the defendant to be paid—and pending the enquiry as to the damages, the costs were taxed, and only a portion being paid, a bankruptcy notice was served on the debtor under section 4, sub-section 1 (g), of the Bankruptcy Act, 1883, for the remainder.

Held: That the sum in respect of which the bankruptcy notice was served was due under a final judgment within the meaning of the section, the amount in question being wholly independent of the result of the enquiry. *In re Faithfull, Ex parte Moore* p. 52

(2) A debtor against whom action was brought allowed judgment to go by default, but subsequently obtained leave to defend on payment of 43*l.* into Court, which he neglected to do.

Judgment was thereupon signed, and a bankruptcy petition presented, and the debtor having refused to give security for the debt as required by the Court, a receiving order was made.

On appeal by the debtor to set aside this order under section 4, sub-section 1 (g) of the Bankruptcy Act, 1883, on the ground that he had a counterclaim, set-off, or cross-demand, which equalled or exceeded the amount of the judgment debt, and which he could not set-up in the action in which judgment was obtained.

Held: That the debtor had had ample opportunity to set up the alleged set-off in the action, which he had neglected to do: and that the order of the County Court was a right order. *In re Isaac, Ex parte Isaac* p. 258

FRAUDULENT PREFERENCE.]—A debtor, on August 28th, 1884, on being pressed by a creditor, who had obtained judgment, for payment of the debt due to him, gave to an auctioneer, who was about to sell the farming stock of such debtor, a document by which he authorized and requested him to pay to such creditor, after deducting any rent which might be due to the landlord, the debt due to him out of the first proceeds of the sale, and appropriated the sum necessary to pay the debt out of the proceeds of the sale for the purposes of the payment.

On October 22nd, 1884, a receiving order was made against the debtor, and the sum so appropriated was subsequently claimed by the official receiver as trustee in the bankruptcy on the grounds (1) That the document was an assignment of the whole of the debtor's property, and as such amounted to an act of bankruptcy; (2) That it was a fraudulent preference.

Held: That under the circumstances of the case the document in question did not amount to an assignment of the whole of the debtor's property.

That the principal motive of the debtor was not to favour the creditor, and that the transaction did not constitute a fraudulent preference.

That the official receiver as trustee having come to the Court was in the same position as an ordinary litigant, and being unsuccessful must pay the costs. *In re Glanville* p. 71

FURNITURE, Fraudulent removal of.]—Appeal from refusal to order prosecution

of a bankrupt. Fraudulent removal of furniture. The Debtors Act 1869 (32 & 33 Vict. c. 62), Sections 11, 12 and 16. *In re Stephens* p. 20

GIFT INTER VIVOS.]—Where at the birth of his eldest son, a father laid down a pipe of port wine, and at the same time expressed an intention to give his eldest daughter certain port wine in particular bins, such wine being thereafter known in the family as the wine of the son and daughter, but remaining in the possession and cellar of the father, who subsequently became bankrupt.

Held: That under the circumstances of the case, there was no proof of any intention on the part of the father of making a present immediate gift, and that the wine belonged to the trustee in the bankruptcy.

That although it is going too far to say that retention of possession by the donor is conclusive proof that there is no immediate present gift, yet unless explained, and its effect destroyed by other circumstances, it is strong evidence against the existence of such an intention ; and, in order to rebut this inference, circumstances must be proved from which it can fairly be inferred that the donor intended to make an immediate gift, so that the thing given then ceased to be the donor's, and became the property of the donee. It is not enough to prove circumstances from which the proper inference is, that the donor intended to make a gift in the future, but so that until something further was done to complete the gift, he should retain the control over the thing intended to be given. *In re Ridgway* p. 248

HOP-TRADE. CUSTOM OF.]—See *In re Taylor, Ex parte Dyer* . . . p. 268

INSOLVENT.]—See *Administration of Estate of Deceased Insolvent*.

INSURANCE.]—See *Personal Examination*. *In re Garnett, Ex parte the Official Receiver* p. 286

JUDGMENT DEBT.]—See (1) *In re Ryley, Ex parte the Official Receiver* . p. 171
 (2) *In re Isaac, Ex parte Isaac* p. 258

(3) *Held*: That upon a petition by a judgment creditor for a receiving order, the Court of Bankruptcy has power, at the instance of the judgment debtor, to go behind the judgment and to enquire into the consideration for the judgment debt even though the debtor has consented to the judgment.

If on the hearing of the petition evidence is put forward of such facts, which, if proved, would shew that, notwithstanding the judgment, there is by reason of fraud or otherwise, no real debt, the Court ought not to make a receiving order without enquiry into the truth of the facts alleged. *In re Lennox, Ex parte Lennox* p. 271

JUDGMENT SUMMONS.]—See (1) *In re Park, Ex parte Koster* . . . p. 35
 (2) *In re Andrews, Ex parte Andrews* p. 244

JURISDICTION.]—Where an agreement entered into by a solicitor to conduct certain bankruptcy proceedings on the terms that his costs should not exceed 10*l.* had been declared void by the County Court Judge on the application of such solicitor, and an appeal from this decision having having been brought to the Divisional Court in Bankruptcy, the preliminary objection was taken that the Court, sitting as a Court of Appeal in bankruptcy matters only, had no jurisdiction to deal with the question at all.

Held : That the Court had jurisdiction to hear the appeal.

That the fact that the agreement did not contain a provision that the solicitor so employed might continue the bankruptcy proceedings to the end, did not make such agreement unfair or unreasonable, and that the order of the County Court Judge setting aside such agreement must be reversed. *In re Owen, Ex parte Peyton* p. 87

Of County Court in Bankruptcy.]—*Held* : That by the provisions of sections 100 and 102 of the Bankruptcy Act, 1883, which give to the County Court “for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the Court all the powers and jurisdiction of the High Court,” and also “full power to decide all questions of priorities, and all other questions whatsoever whether of law or fact which may arise in any case of bankruptcy,” a County Court has no jurisdiction or power to restrain an action in the High Court brought against the trustee of a debtor adjudicated bankrupt in such County Court. *In re Barnett, Ex parte Reynolds & Co.* p. 147

Of Registrar.]—*Appeal* from an order of the Registrar the effect of which was to set aside as against the trustee in a bankruptcy under the Bankruptcy Act, 1869, a post-nuptial settlement executed by the bankrupt.

Objection. That under the provisions of the Bankruptcy Act, 1883, the Registrar had no jurisdiction to make the order.

Held : That the jurisdiction which the registrars in bankruptcy had by delegation or otherwise, under the Bankruptcy Act, 1869, is preserved to them in respect of pending proceedings by section 169, sub-section (3), of the Bankruptcy Act, 1883.

That Rule 264 of the Bankruptcy Rules, 1883, which provides for the exercise of their jurisdiction is not *ultra vires*, and is properly framed for the purpose of carrying out the intention of the legislature with regard to pending proceedings. *In re Home, Ex parte Edwards* p. 203

LANDLORD.]—See *Disclaimer*.

MARRIAGE SETTLEMENT.]—Where by a marriage settlement the settlor covenanted that he, during his life, or his representatives within twelve months after his death, would pay the sum of 5000*l.* to the trustees to be held by them on the trusts of the settlement, and the settlor subsequently became bankrupt.

Held, following the decision of the Court of Appeal in the case of *Ex parte Bishop, In re Tonnes* (L. R. 8 Ch. App. 718) : That a covenant for payment of a sum of money not specifically earmarked, was not within section 47, sub-section (2), of the Bankruptcy Act, 1883, as a covenant for the future settlement of money

or property in which the settlor had no interest at the date of his marriage, and that the trustees were entitled to prove against the estate. *In re Knight, Ex parte Cooper* p. 223

MARRIED WOMAN.]—*Held*: That under the provisions of the Married Women's Property Act, 1882, a wife who advances money to her husband out of her separate estate is not entitled, on the bankruptcy of her husband, either to prove or vote until all the other creditors of the bankrupt have been satisfied. In such case it lies on the wife to shew that the money has not been advanced to the husband for the purposes of his business. *In re Genese, Ex parte the District Bank* p. 283

MAYOR'S COURT.]—See (1) *In re Holland, Ex parte Warren* p. 142
 (2) *In re Ryley, Ex parte the Official Receiver* p. 171

“MEANS TO PAY”—*Meaning of Term.*]—See *In re Park, Ex parte Koster* p. 35

MEDICAL EXAMINATION.]—See *Personal Examination*.

MUTUAL DEALINGS.]—*Held*: That, as a general rule, and in the absence of special circumstances where there are mutual dealings between a debtor and his creditors, the line as to set-off must be drawn at the date of the commencement of the bankruptcy. *In re Gillespie, Ex parte Reid & Son* p. 100

OFFICIAL RECEIVER.] *Powers and duties of.*]—(1) *Held*: That before the appointment of a trustee by the creditors the official receiver who is, by section 54 of the Bankruptcy Act, 1883, the trustee for the purposes of that Act until a trustee is appointed, has power after an adjudication in bankruptcy has been made against a debtor, to exercise the powers given by Section 56 of the Act to the trustee.

Such official receiver, therefore, may sell the property of the bankrupt. *In re Parker and Parker, Ex parte the Board of Trade* p. 158

(2) Powers of Official Receiver—Compromise—Sanction of the Board of Trade—Certificate under Section 140, Sub-section (2) of the Bankruptcy Act, 1883—Costa. *In re Johnstone, Ex parte Singleton* p. 206

Costs of.]—See *In re White, Winter & Co., Ex parte White, Winter & Co.* p. 42

Costs of, as Trustee.]—See *In re Glanville, Ex parte the Trustee* p. 71

Costs of,—acting as Solicitor.]—*Held*: That the effect of section 116, sub-section (2) of the Bankruptcy Act, 1883, which provides that no official receiver “shall, during his continuance in office, either directly or indirectly, by himself, his clerk, or partner, act as solicitor in any proceeding in bankruptcy,” is not limited to cases of the official receiver acting as solicitor by himself, his clerk or partner, for another person, or on an application for the benefit of the estate, but extends also to cases where the official receiver is acting as solicitor for himself and

conducting a case on his own behalf. *In re Taylor, Ex parte the Official Receiver* p. 127

Objection to Report of.]—(1) Where, on an application for discharge of a bankrupt, an objection was taken on behalf of the bankrupt to the report of the official receiver being received in evidence, on the ground that, although such report bore the signature of that official, it was not prepared by him.

Held: That such a report is *prima facie* evidence of the statements contained therein, as provided by section 28, sub-section (4) of the Bankruptcy Act, 1883, and that the Court will not go behind the report or enter into any enquiry as to by whom it was prepared. *In re Bull* p. 59

(2) On a contention raised that although for the purposes of the discharge of a bankrupt under section 28 of the Bankruptcy Act, 1883, the report of the official receiver is *prima facie* evidence of the truth of the statements therein contained. Nevertheless for the purposes of the approval of a composition or scheme under section 18, sub-section (6) of the Act, such report is not made *prima facie* evidence, and that the registrar ought not to refuse to approve a composition without having the facts mentioned in section 28, sub-section (3), proved by other evidence.

Held: That the report of the official receiver is *prima facie* evidence for the purposes of section 18, sub-section (6), and that the same proof of the facts referred to in section 28, sub-section (3), which is sufficient in the case of the discharge of a bankrupt under that section would also be sufficient proof in the case of the approval of a composition or scheme under section 18, sub-section (6). *In re Wallace, Ex parte Campbell* p. 167

Report of in Small Bankruptcy.]—*Held:* That where the official receiver reports to the Court under section 121 of the Bankruptcy Act, 1883, that the property of a debtor is not likely to exceed in value 300*l.*, such report is *prima facie* to be acted upon, and the Court ought not, at any rate without some definite reason, to refuse to make an order for summary administration. *In re Horniblow, Ex parte the Official Receiver* p. 124

ORDER AND DISPOSITION.]—(1) In a case where a bankrupt took a house with 79 acres of land, at a rent of 400*l.* a year, and subsequently rented other land to the extent of 100 acres (part of which he sublet), and farmed the land so taken for pleasure, and out of the returns supplied his house, and sold the surplus farm and garden produce, and also bred horses.

Held: That the house and land were taken for pleasure and enjoyment, and not for the purpose of business; that this intention was never changed into such a purpose as that of holding them for business only; and that the bankrupt had not carried on business as a farmer or market gardener so as to entitle the trustee in the bankruptcy to claim certain goods against a bill of sale holder, as being in the order and disposition of the bankrupt in his trade or business under section 44, sub-section (3) of the Bankruptcy Act, 1883. *In re Wallis, Ex parte the Trustee* p. 79

(2) In a case where the bankrupt who carried on business as a stockbroker silversmith, and watchmaker, deposited in the year 1878 the certificates of thirty

shares in a wagon company with a bank in order to secure his overdrawn account, but such shares continued to be registered in the name of the bankrupt, and in 1884 a receiving order was made against the bankrupt, whereupon the trustee appointed in the bankruptcy laid claim to the said thirty shares, and the County Court judge decided that the said shares were in the order and disposition of the bankrupt in his trade or business at the time of the bankruptcy, and directed the bank to hand them over to such trustee.

Held: That the shares in question were not in the bankrupt's possession in his trade or business : that they had in fact been registered in the name of the bankrupt for six years, and were held by him simply as an investment and not for the purpose of selling to his customers ; and that the order of the County Court judge directing the bank to hand over such shares to the trustee in the bankruptcy must be reversed. *In re Jenkinson* p. 131

(3) Where a partner in a stockbroking firm purchased shares in a railway company with money of the firm, and subsequently deposited the share certificates with the firm's bankers as security or cover for advances made by them to the firm, and before notice of the deposit had been given to the railway company, the firm and also the members of it were adjudicated bankrupts.

Held: That the trustee in the bankruptcy was entitled to such shares as goods in "the possession, order, or disposition of the bankrupt in his trade or business," within section 44, sub-section (3), of the Bankruptcy Act, 1883.

That the words "in his trade or business" in the said section, mean "for the purposes of and as connected with his trade or business."

(*Fry, L. J., dissentiente.*) That such shares were not choses in action within the meaning of the Act, so as to be excepted from the doctrine of reputed ownership. *Colonial Bank v. Whinney* p. 234

(4) *Held:* That a custom exists in the hop trade for hop merchants to retain in their warehouse hops purchased by their customers, so as to prevent the operation of the order and disposition clause—section 44, sub-section (3)—of the Bankruptcy Act, 1883.

At the time of the presentation of a bankruptcy petition by the debtor, who carried on business as a hop and seed merchant, there were lying in his warehouse certain pockets of hops which he had sold to the applicant. The hops were left there for the convenience of the purchaser, and had been duly paid for. It was proved to be the custom of the hop-trade for hops sold to remain in the warehouse of the merchant to the order of the purchaser, and that no person familiar with the hop-trade would suppose that all hops lying in a hop merchant's warehouse were the property of such merchant.

Held: That the existence of a custom of this nature, shewn to be well known amongst persons concerned in the hop-trade, excluded the doctrine of reputed ownership, and that the hops did not pass to the trustee. *In re Taylor, Ex parte Dyer* p. 268

PAYMENT.]—See *Suspension of Payment*.

PENDING BUSINESS.]—See *Jurisdiction*.

PERSONAL EXAMINATION.]—Where application was made under section 19 of the Bankruptcy Act, 1869 (*see section 24 of the Bankruptcy Act, 1883*), for an order upon a debtor to answer certain enquiries and to submit to a medical examination for the purpose of life insurance.

Held : That the provisions of the section apply to an examination of the debtor in respect of property : and that the Court could not under the section make an order for the personal examination of the debtor as to the state of health, with a view to insurance. *In re Garnett, Ex parte the Official Receiver* . . . p. 286

POST—Notice of Appeal sent by.]—See *In re Arden, Ex parte Arden* . . . p. 1

PROOF—Amendment of.]—(1) *Held* : That, where a mortgagee who has valued his security is desirous of amending his valuation and proof under rule 13 of schedule 2 of the Bankruptcy Act, 1883, leave to amend may be given in a proper case, although such amendment is opposed by a subsequent mortgagee. *In re Arden, Ex parte Arden* p. 1

(2) Where an application made by a secured creditor for leave to withdraw or amend his proof put in from inadvertence for the full amount of the debt, and without mentioning the security, was refused by the County Court Judge.

Held : That there was clearly no intention to give up the security, and that proof for the full amount of the debt having been put in from inadvertence, leave to amend ought to have been granted. *In re King, Ex parte Mesham* . . . p. 119

For Alimony.]—*Held* : That where an order is made by the Divorce Court for the future payment of alimony by a husband under the statute 29 & 30 Vict. c. 32, s. 1, such payments are not capable of valuation and cannot therefore be proved for in the event of the husband being adjudicated bankrupt, but such husband is liable to continue the payments notwithstanding the bankruptcy. *In re Linton, Ex parte Linton* p. 179

For Re-exchange.]—Where six bills of exchange were drawn in Tobago, accepted by the debtors, and made payable at the London and Westminster Bank, but were subsequently dishonoured, and thereupon sent back to Tobago, and taken up by the drawers who sought to prove for the re-exchange against the debtor's estate.

Held : That subject to the damages being proved, the claim ought to be admitted : that the re-exchange mentioned in section 57 of the Bills of Exchange Act, 1882, was simply the difference between English and foreign currency, and that under that Act the claim was still admissible. *In re Gillerpie, Ex parte Roberts* . p. 278

By Wife.]—*Held* : That under the provisions of the Married Women's Property Act, 1882, a wife who advances money to her husband out of her separate estate is not entitled, on the bankruptcy of the husband, either to prove or vote until all the other creditors of the bankrupt have been satisfied.

In such case it lies on the wife to show that the money has not been advanced to the husband for the purposes of his business. *In re Genese, Ex parte the District Bank* p. 283

Rejection of.]—(1) On an appeal by the trustee in a bankruptcy from an order of,

the County Court allowing a preliminary objection raised against the rejection of a proof by such trustee, that such rejection was out of time as provided by rule 173 of the Bankruptcy Rules, 1883.

Held: That the objection must fail : that the question was one merely of procedure : and that the proper course for the Registrar of the County Court to have taken, was to have treated the application as a motion to expunge the proof on behalf of the trustee. *In re Sissling, Ex parte Fenton* p. 289

(2) The father of a bankrupt carried in two separate proofs against the estate for 3,000*l.* which were respectively rejected by the trustee to the extent of 2,000*l.*, and on the application of another creditor were subsequently expunged in the County Court.

The creditor appealed, but while the appeals were pending a compromise was entered into according to the terms of which it was agreed that the claim of the creditor should be reduced to the sum of 1,380*l.*, and that all costs should be paid by the trustee.

On application to the County Court Judge for an order for taxation in accordance with the terms of this compromise it was refused.

Held : (on appeal) :—That the proper course was to come to the Court for its consent to the arrangement : and that the refusal of the County Court Judge to grant an order for taxation under the circumstances was right. *In re Green, Ex parte Edmunds* p. 294

"PROPERTY"—*Meaning of.*] *Held*: That the word "property" as used in section 55, and as defined in section 168 of the Bankruptcy Act, 1883, is not restricted to "property divisible amongst the creditors" mentioned in section 44, but extends to any kind of property subject to any onerous covenants or obligations which may be vested in the debtor. *In re Maughan* p. 25

PUBLIC EXAMINATION.]—*Held*: That the provisions of section 17, sub-section (4) of the Bankruptcy Act, 1883, by which at the public examination of a debtor "any creditor who has tendered a proof, or his representative authorized in writing may question the debtor concerning his affairs and the causes of his failure," apply to a solicitor representing a creditor who has tendered a proof, and that such solicitor before being permitted to examine a debtor at his public examination must produce, if so requested, his written authority from such creditor. *The Queen v. The Registrar of the Greenwich County Court* p. 175

"RASH AND HAZARDOUS."]—See *Speculations*.

RE-EXCHANGE.]—See *Proof*.

REGISTRAR.]—See *Jurisdiction*.

REPORT.]—See *Official Receiver*.

REPUTED OWNERSHIP.]—See *Order and Disposition*.

REQUEST, APPLICATION FOR ORDER OF.]—See *In re Bell* . . . p. 291

REVIEW.]—Where, on the refusal of an application by the registrar, application was subsequently made to the Judge sitting in bankruptcy to review the decision.

Held: That there was no power to accede to the request, and that in the event of the registrar declining to review his own decision, the proper course was by way of appeal to the Court of Appeal. *In re Moore* p. 78

SALE—by Official Receiver.]—*Held*: That before the appointment of a trustee by the creditors the official receiver who is, by section 54 of the Bankruptcy Act, 1883, the trustee for the purposes of that Act until a trustee is appointed, has power, after an adjudication in bankruptcy has been made against a debtor, to exercise the powers given by section 56 of the Act to the trustee.

Such official receiver, therefore, may sell the property of the bankrupt. *In re Parker & Parker, Ex parte the Board of Trade* p. 158

SCHEME OF ARRANGEMENT.]—See *Composition*. *Held*: That the fact that, before the presentation of a bankruptcy petition against the debtor, a large number of the creditors have assented to a deed of arrangement, is not a "sufficient cause" within the meaning of section 7, sub-section (3) of the Bankruptcy Act, 1883, for dismissing such petition presented by a dissenting creditor, however beneficial to the creditors the terms of such arrangement may be; and that, in consequence, there is no jurisdiction to adjourn generally the hearing of such petition with a view to its ultimate dismissal if the arrangement should be found to work well.

The case of *In re Dixon & Wilson, Ex parte Dixon & Wilson* (see *ante*, Volume I., page 98), approved and explained to the effect that the decision there did not depend upon the particular terms of the arrangement, but upon the fact that such arrangement was made at the time, and in the manner, and by the persons by whom it was made, *In re Watson & Smith, Ex parte Oram* p. 199

SECURED CREDITOR.]—See *Creditor*.

SEPARATE PROPERTY.]—See *Married Woman*. *In re Genese, Ex parte the District Bank* p. 283

SERJEANT-AT-MACE.]—See *Execution*. On February 12th, 1885, a receiving order was made against the debtor, and on February 23rd, the summary administration of his estate was ordered under section 121 of the Bankruptcy Act, 1883.

On February 25th, while on his way to the office of the official receiver for the purpose of handing to that officer certain moneys which he had been ordered to pay over, the debtor was served by the serjeant-at-mace of the Mayor's Court with

an order of commitment for having failed to pay an instalment of 2*l.* 8*s.* 6*d.* due under a judgment previously obtained in that Court.

This sum, in order to avoid arrest, debtor paid under protest. On application made by the official receiver that it should be paid over to him.

Held: That under section 9 of the Bankruptcy Act, 1883, the creditor lost the right to enforce the payment by arrest, and that the official receiver was entitled to the money. *In re Ryley, Ex parte the Official Receiver* p. 171

SET-OFF.]—(1.) *Held:* That, as a general rule, and in the absence of special circumstances where there are mutual dealings between a debtor and his creditors, the line as to set-off must be drawn at the date of the commencement of the bankruptcy. *In re Gillespie, Ex parte Reid & Son* p. 100

(2.) See *In re Isaac, Ex parte Isaac* p. 258

SETTLEMENT.]—See also *Voluntary Settlement.*

Where by a marriage settlement the settlor covenanted that he, during his life, or his representatives within twelve months after his death, would pay the sum of 5,000*l.* to the trustees to be held by them on the trusts of the settlement, and the settlor subsequently became bankrupt.

Held, following the decision of the Court of Appeal in the case of *Ex parte Bishop, In re Tonnes* (L. R. 8 Ch. App. 718) : That a covenant for payment of a sum of money not specifically earmarked was not with section 47, subsection (2), of the Bankruptcy Act, 1883, as a covenant for the future settlement of money or property in which the settlor had no interest at the date of his marriage, and that the trustees were entitled to prove against the estate. *In re Knight, Ex parte Cooper* p. 223

SHARES.]—See (1.) *In re Jenkinson, Ex parte the Nottingham and Nottinghamshire Bank* p. 131
 (2.) *Colonial Bank v. Whinney* p. 234
 (3.) *In re Player* p. 261

SHERIFF.]—See *Execution.*

SMALL BANKRUPTCIES.]—See (1.) *In re Dale, Ex parte Dale* p. 92
 (2.) *In re Sandwell, Ex parte Zerfaess* . p. 95
 (3.) *In re Horniblow, Ex parte the Official Receiver* p. 124
 (4.) *In re Stockton & Sabistan, Ex parte Gibson* p. 189

SOLICITOR—*Costs as between solicitor and client.*]—The Court by three orders gave costs “as between party and party.”

Subsequently an application was made that such costs might be "as between solicitor and client;" which application was refused.

Held (on appeal) :—That the application ought to have been made to the Court at the time when the costs were awarded ; and that the words of Rule 98 of the Bankruptcy Rules, 1883—"the court in awarding costs"—mean at the time when the Court makes the order. *In re Angell, Ex parte Shoolbred* p. 5

Agreement for Costs of.]—Where an agreement entered into by a solicitor to conduct certain bankruptcy proceedings on the terms that his costs should not exceed 10*l.* had been declared void by the County Court Judge on the application of such solicitor, and an appeal from this decision having been brought to the Divisional Court in Bankruptcy, the preliminary objection was taken that the Court, sitting as a Court of Appeal in bankruptcy matters only, had no jurisdiction to deal with the question at all.

Held : That the Court had jurisdiction to hear the appeal.

That the fact that the agreement did not contain a provision that the solicitor so employed might continue the bankruptcy proceedings to the end did not make such agreement unfair or unreasonable, and that the order of the County Court Judge setting aside such agreement must be reversed. *In re Owen, Ex parte Peyton* p. 87

Taxation of Costs of.]—*Held* : That where, in an ordinary taxation of the costs of the solicitor to the trustee in the bankruptcy, the amount of the solicitor's bill is reduced by more than one-sixth, there is no rule in the Court of Bankruptcy that such solicitor shall pay the costs of the taxation.

That the provisions of the Attorneys and Solicitors Act (6 & 7 Vict. c. 73) do not apply in an ordinary reference to tax such costs, but the taxation is regulated by the practice of the Court of Bankruptcy. *In re Marsh, Ex parte Marsh* p. 232

Right of audience of.]—*Held* : That under the Bankruptcy Act, 1883, and the Bankruptcy Appeals (County Courts) Act, 1884, a solicitor has the same right of audience in the Divisional Court sitting as a Court of Appeal from orders of the County Courts in Bankruptcy matters as that formerly possessed under the Bankruptcy Act, 1869, in the case of an appeal from the County Court to the Chief Judge in Bankruptcy. *In re Barnett, Ex parte the Trustee* p. 122

Right at Public Examination.]—*Held* : That the provisions of section 17, subsection (4) of the Bankruptcy Act, 1883, by which at the public examination of a debtor "any creditor who has tendered a proof, or his representative authorised in writing, may question the debtor concerning his affairs and the causes of his failure," apply to a solicitor representing a creditor who has tendered a proof, and that such solicitor before being permitted to examine a debtor at his public examination must produce, if so requested, his written authority from such creditor. *The Queen v. The Registrar of the Greenwich County Court* p. 175

Money paid to by bankrupt.]—On the presentation of a bankruptcy petition against a debtor, and an order for the appointment of an interim receiver having been made, such debtor instructed his solicitor to oppose the petition, and to move to rescind the interim order, and then paid to such solicitor at his request 25*l.* on account of costs of counsel's fees, and other expenses for that purpose.

The application to rescind the interim order was dismissed, and the debtor was subsequently adjudicated bankrupt.

The trustee in the bankruptcy thereupon claimed the 25*l.* from the solicitor as money received by him from the debtor with knowledge of the act of bankruptcy, on which the receiving order was made.

Held: That the application of the trustee must be refused ; that it was right that a debtor should have legal assistance and advice against a bankruptcy petition ; and that a debtor would be left practically defenceless if money paid to a solicitor for services rendered on such an occasion could afterwards be recovered by the trustee. *In re Sinclair, Ex parte Payne* p. 255

SPECULATIONS—*Rash and Hazardous.*]—(1) In a case where a debtor, as the managing director of a mining company, the mines being undeveloped, advanced both his own and borrowed money to the company, which subsequently became insolvent, and a petition in bankruptcy was presented against the debtor, and a composition accepted by his creditors.

Held: That the debtor had been guilty of rash and hazardous speculations ; and that the registrar was quite right in refusing to approve the composition offered. *In re Young, Ex parte Young* p. 37

(2) Where the bankrupt who was a solicitor without capital entered into heavy building speculations on borrowed money, to which speculations his insolvency was attributable.

Held: That the bankrupt had been guilty of rash and hazardous speculations ; and that the order of the registrar refusing an absolute discharge was a right order. *In re Salaman, Ex parte Salaman* p. 61

“ SUFFICIENT CAUSE.”]—*Held:* That the fact that, before the presentation of a bankruptcy petition against a debtor, a large number of the creditors have assented to a deed of arrangement, is not a “ sufficient cause ” within the meaning of section 7, sub-section (3) of the Bankruptcy Act, 1883, for dismissing such petition presented by a dissenting creditor, however beneficial to the creditors the terms of such arrangement may be ; and that, in consequence, there is no jurisdiction to adjourn generally the hearing of such petition with a view to its ultimate dismissal if the arrangement should be found to work well.

The case of *In re Dixon & Wilson, Ex parte Dixon & Wilson* (*see ante*, Volume I page 98), approved and explained to the effect that the decision there did not depend upon the particular terms of the arrangement, but upon the fact that such arrangement was made at the time, and in the manner, and by the persons by whom it was made. *In re Watson & Smith, Ex parte Oram* p. 199

SUSPENSION OF PAYMENT.]—(1) *Held:* That the fact that a debtor called a meeting of his creditors at which he laid before them his position, and made an offer of 6*s.* 8*d.* in the pound, did not amount to a notice by such debtor “ that he has suspended, or that he is about to suspend payment of his debts,” so as to constitute an act of bankruptcy under section 4, sub-section 1 (h) of the Bankruptcy Act, 1883. *In re Walsh, Ex parte the Trustee* p. 112

(2) Where two circulars were sent out by the solicitors of the debtor to the

creditors, calling a meeting of the creditors, and laying before them the position of the debtor, and further stating that by the kindness of friends, and by raising money upon his furniture, such debtor might be enabled to pay 10s. in the pound, provided all the creditors would accept it to save bankruptcy proceedings, but that if all the creditors would not agree, there was no alternative but to seek the protection of the Court.

Held: That such statements amounted to a notice by the debtor "that he has suspended or that he is about to suspend payment of his debts," so as to constitute an act of bankruptcy under section 4, sub-section 1 (h) of the Bankruptcy Act, 1883. *In re Wolstenholme, Ex parte Wolstenholme* p. 213

TAXATION.]—See *Costs*.

Held: That where, in an ordinary taxation of the costs of the solicitor to the trustee in the bankruptcy, the amount of the solicitor's bill is reduced by more than one-sixth, there is no rule in the Court of Bankruptcy that such solicitor shall pay the costs of the taxation.

That the provisions of the Attorneys and Solicitors Act (6 & 7 Vict. c. 73) do not apply in an ordinary reference to tax such costs, but the taxation is regulated by the practice of the Court of Bankruptcy. *In re Marsh, Ex parte Marsh* p. 232

Order for.]—See In re Green, Ex parte Edmunds p. 294

TIME.]—See (1) <i>In re Arden, Ex parte Arden</i>	p. 1
(2) <i>In re Angell, Ex parte Shoobred</i>	p. 5
(3) <i>In re Stockton & Sabistan, Ex parte Gibson</i>	p. 189
(4) <i>In re Mundy, Ex parte Stead</i>	p. 227
(5) <i>In re Tippett, Ex parte Tippett</i>	p. 229
(6) <i>In re Sissling, Ex parte Fenton</i>	p. 289

"TRADE OR BUSINESS."]—(1) In a case where the bankrupt took a house with 79 acres of land, at a rent of 400l. a year, and subsequently rented other land to the extent of 100 acres (part of which he sublet), and farmed the land so taken for pleasure, and out of the returns supplied his house, and sold the surplus farm and garden produce, and also bred horses.

Held: That the house and land were taken for pleasure and enjoyment, and not for the purpose of business ; that this intention was never changed into such a purpose as that of holding them for business only ; and that the bankrupt had not carried on business as a farmer or market gardener so as to entitle the trustee in the bankruptcy to claim certain goods against a bill of sale holder, as being in the order and disposition of the bankrupt in his trade or business under section 44, sub-section (iii.) of the Bankruptcy Act, 1883. *In re Wallis, Ex parte the Trustee* p. 79

(2) In a case where the bankrupt who carried on business as a stockbroker, silversmith, and watchmaker, deposited in the year 1878 the certificates of thirty

shares in a waggon company with a bank in order to secure his over-drawn account, but such shares continued to be registered in the name of the bankrupt, and in 1884 a receiving order was made against the bankrupt, whereupon the trustee appointed in the bankruptcy laid claim to the said thirty shares, and the County Court Judge decided that the said shares were in the order and disposition of the bankrupt in his trade or business at the time of the bankruptcy, and directed the bank to hand them over to such trustee.

Held : That the shares in question were not in the bankrupt's possession in his trade or business ; that they had in fact been registered in the name of the bankrupt for six years, and were held by him simply as an investment and not for the purpose of selling to his customers ; and that the order of the County Court Judge directing the bank to hand over such shares to the trustee in the bankruptcy must be reversed. *In re Jenkinson, Ex parte the Nottingham and Nottinghamshire Bank* p. 131

(3) Where a partner in a stockbroking firm purchased shares in a railway company with money of the firm, and subsequently deposited the share certificates with the firm's bankers as security or cover for advances made by them to the firm, and before notice of the deposit had been given to the railway company, the firm, and also the members of it, were adjudicated bankrupts.

Held : That the trustee in the bankruptcy was entitled to such shares as goods in "the possession, order, or disposition of the bankrupt in his trade or business," within section 44, sub-section (iii.), of the Bankruptcy Act, 1883.

That the words "in his trade or business" in the said section mean "for the purposes of and as connected with his trade or business."

(*Fry, L. J., dissentiente.*) That such shares were not choses in action within the meaning of the Act, so as to be excepted from the doctrine of reputed ownership. *Colonial Bank v. Whinney* p. 234

VOLUNTARY SETTLEMENT.]—See also *Settlement*.

Held : (1) That where a bankruptcy occurred after the coming into operation of the Bankruptcy Act, 1883, a settlement under section 47 of that Act is void, although made prior to the Act coming into operation.

Section 47 of the Bankruptcy Act, 1883, applies to settlements executed before, as well as after, the Act came into operation.

Where, in the year 1880, the bankrupt gave to his son a sum of money for the purchase of shares in a ship, which were so purchased by the son.

Held : That the transaction was a voluntary settlement within section 47 of the Bankruptcy Act, 1883, and void as against the trustee. *In re Player* . p. 261

(2) Where in the year 1882, more than two years before the bankruptcy, a bankrupt had advanced to his son the sum of 650*l.*, to enable the son to set up and carry on business, and the son himself brought in 150*l.* and carried on the business.

Held : That the transaction was not a voluntary settlement within section 47 of the Bankruptcy Act, 1883. *In re Player, Ex parte Harvey* p. 265

WITNESSES—*Power to Examine.*]—Where an order of commitment was made

against the widow and son of a deceased debtor whose estate was being administered in bankruptcy under the provisions of section 125 of the Bankruptcy Act, 1883, on the ground that they had refused to comply with an order of the County Court directing them to attend for the purpose of being examined with regard to the estate of such deceased debtor under section 27 of the Act.

Held : That section 27 of the Bankruptcy Act, 1883, does not apply to section 125 of the Act ; that the powers under Order XXXVII., Rule 5, of the Supreme Court Rules, 1883, as to the examination of witnesses, only exist where some litigation is in progress ; and that the rule 58 of the Bankruptcy Rules, 1883, does not give any such power as was sought for in the present case. *In re Hewitt, Ex parte Hewitt* p. 184

WRIT.]—See *Execution*.

NOTE.

CASES OVERRULED IN THIS VOLUME.

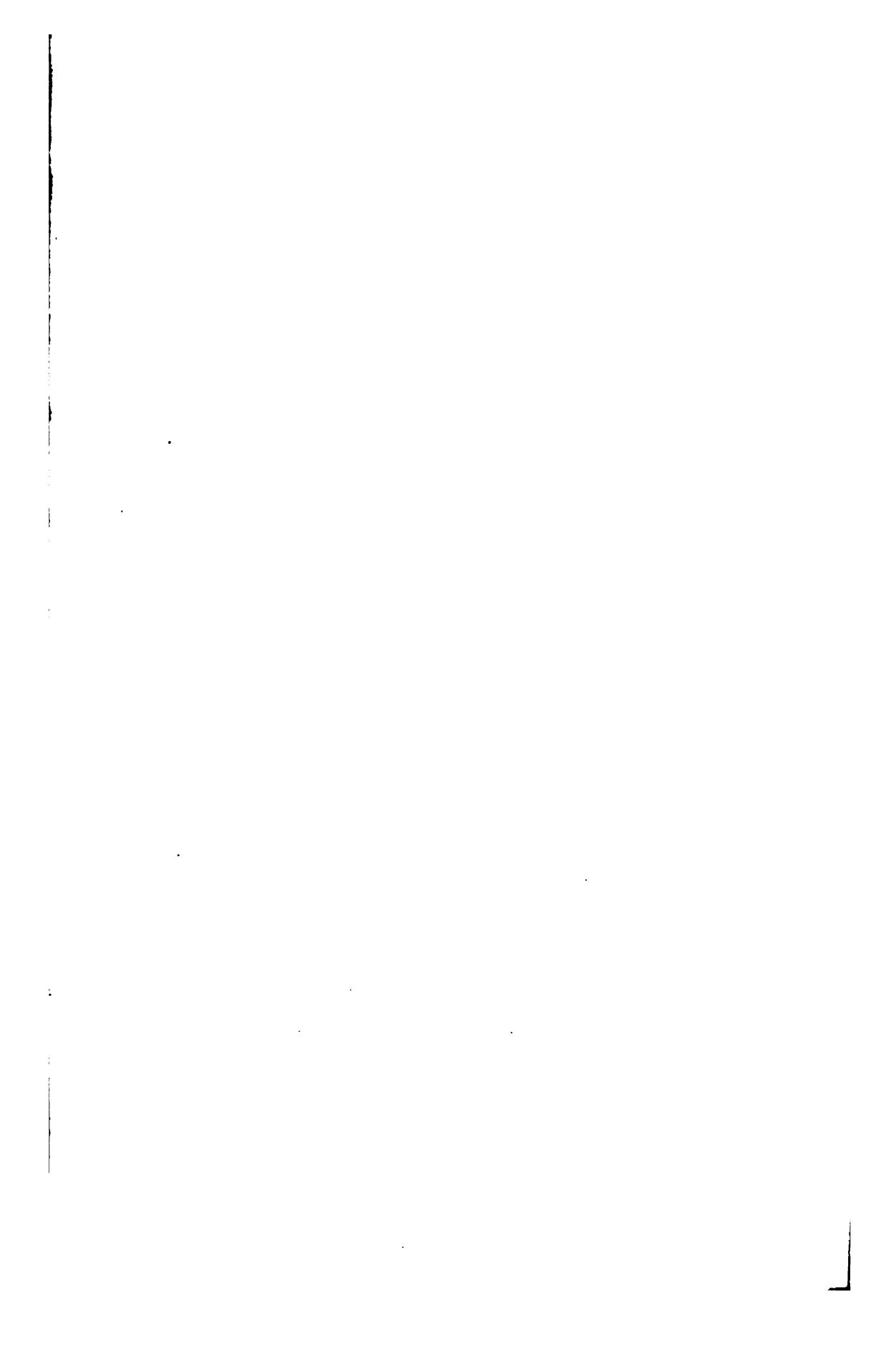
- (1) The case of *In re Parker & Parker, Ex parte the Trustee*, reported at page 12, is overruled by *In re Parker & Parker, Ex parte the Board of Trade*, reported at page 158.
- (2) The decision in the case of *In re Landrock*, reported in Volume I. at page 21, is overruled by *The Queen v. The Registrar of the Greenwich County Court*, reported at page 175 of the present volume.

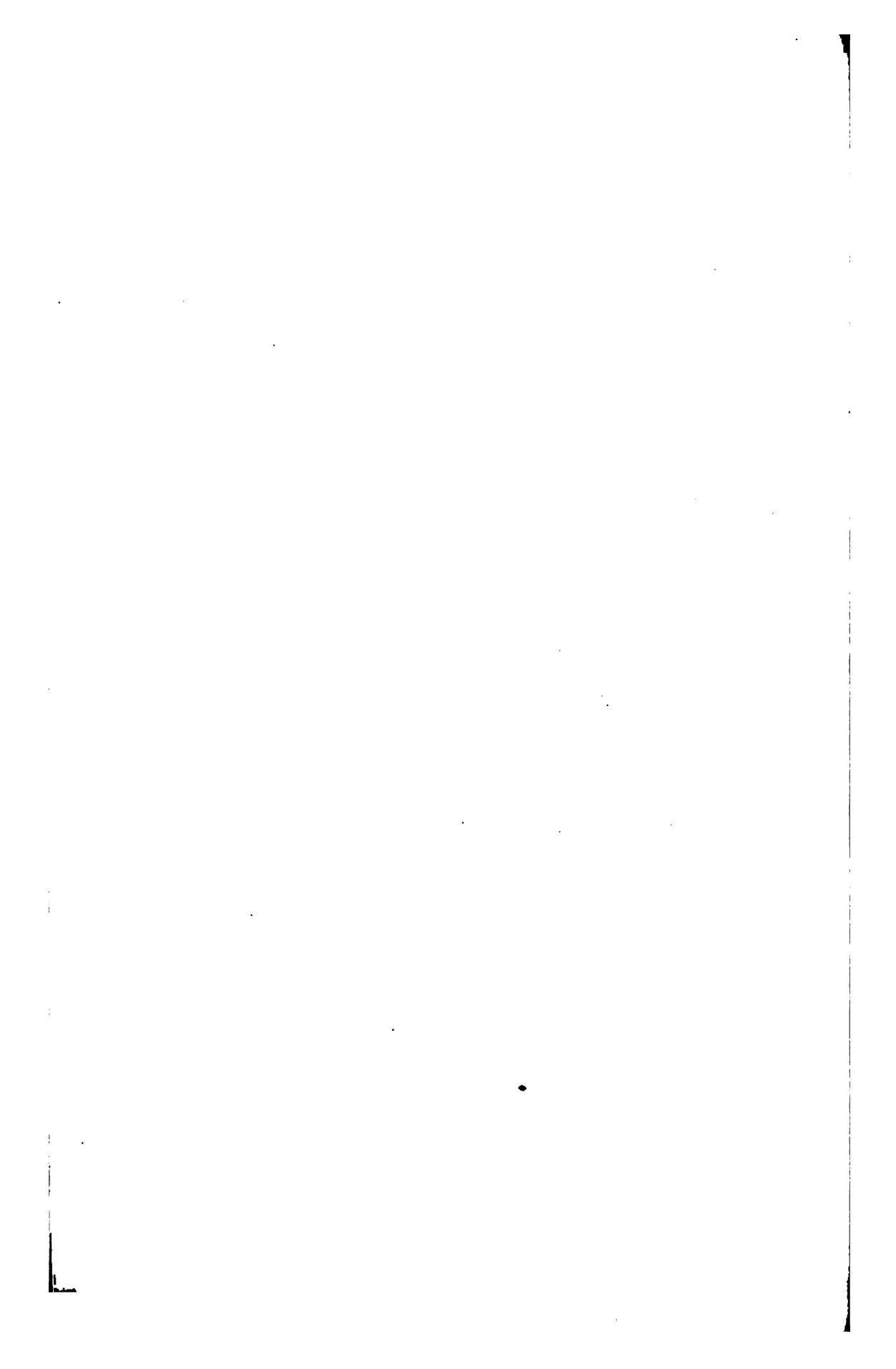
END OF VOL. II.











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